93-125

No. _____

In The

# Supreme Court of the United States

October Term, 1993

PAUL F. RENNEISEN, THOMAS F. LETO, LAWRENCE M. KAMPA, *et al.*,

*Petitioners,*

v.

AMERICAN AIRLINES, INC.,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a collective bargaining agreement that grants to a subgroup within the bargaining unit permanent job security and pay and retirement benefit guarantees that can never be reduced by subsequent agreement between the employer and the bargaining representative, but only by unanimous agreement between the employer and the bargaining representative and a majority of the subgroup, thereby providing members of the subgroup a permanent right of veto as to these issues, violates the exclusive representation requirements of section 2 of the Railway Labor Act?

## PARTIES TO THE PROCEEDING

The petitioners are Paul F. Renneisen, Thomas Frank Leto, Lawrence M. Kampa, Jr., Arpad E. Horvath, Karl Bork, Carl W. Battis and John H. N. Whatley. The respondent is American Airlines, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Paul F. Renneisen, Thomas Frank Leto, Lawrence M. Kampa, Jr., Arpad E. Horvath, Karl Bork, Carl W. Battis and John H. N. Whatley respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 990 F.2d 918, and is

included in the appendix at 1a. The memorandum opinion and order for the United States District Court for the Northern District of Illinois is included in the appendix at 18a. The report and recommendation of the magistrate judge is included in the appendix at 36a.

## JURISDICTION

The court of appeals entered judgment affirming the decision of the district court on March 24, 1993. The court of appeals denied petitioners' petition for rehearing on April 22, 1993. This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 2, Part Fourth, of the Railway Labor Act, 45 U.S.C. § 152 (Fourth), provides in pertinent part that

> [e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of

> the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain members of any labor organization . . .

Section 2, Part Ninth, of the Railway Labor Act, 45 U.S.C. § 152 (Ninth), provides in pertinent part that

> upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purpose of this Act.

## STATEMENT

1. *Background.* In 1983, American Airlines, Inc. ("American") entered into a collective bargaining agreement ("Agreement") with the Allied Pilots Association (the "APA" or "Union")[1] intended to reduce its pilot labor costs and to allow American to compete more effectively against the new, low-cost carriers that had entered the air transport marketplace after the deregulation of the airline industry in 1978. The Agreement imposed on the pilots a two-tier wage structure, providing that current (A-scale) pilots would receive lifetime job security and a guarantee that wages and pension benefits would never be reduced below November, 1983 levels and (B-scale)

[1] The APA is recognized as the bargaining representative for all cockpit personnel employed by American. Petitioners are all members of the APA hired after November 1, 1983.

pilots hired after November 1, 1983 could be hired at substantially lower market rates and without similar guarantees. Smythe Decl., R. 31, ¶ 14.[2] This wage structure was memorialized as Supplement B to the Agreement.

Supplement B further provides that

* * *

> 2. . . . [T]he parties hereto, as well as the persons bound hereby, irrevocably waive the right to serve any Section 6 notice, under the Railway Labor Act, of an intended change which, if adopted, would have the effect of modifying any of the provisions contained in this Agreement or otherwise to require bargaining as to such provisions, provided, however, that this Agreement may be changed by unanimous agreement between the parties and a majority of the pilots with job security and guarantee of employment as provided herein.
>
> 3. Neither the Company nor the Allied Pilots Association, their successors, assigns or affiliates, shall challenge, contest, or question the legality, validity, or enforceability of this Agreement, or any provision thereof, in any judicial, administrative, or other proceeding, and each of the parties shall participate in defending the legality, validity, and enforceability of this Agreement in any judicial, administrative, or other proceeding involving any of its provisions.

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[2] "R. ___" refers to the item number in the record below.

> C. Nothing contained herein shall be deemed to restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the pilots in the employ of the company prior to November 1, 1983 and those hired on or after November 1, 1983, provided, however, that neither party will attempt to totally eliminate the existing differentials.

App. at 57a.

Paragraph 2 was specifically designed to prevent the anticipated B-scale majority from bargaining away the A-scale benefits secured by Supplement B. Smythe Decl. R. 31, ¶ 13.

Since 1983, the parties, through collective bargaining, have negotiated a series of reductions in the pay and benefit differentials between A-scale pilots and B-scale pilots. However, those differentials cannot be completely eliminated. Indeed, although American and the APA subsequently agreed to return to a unified wage scale based on seniority, because pilots now start from the B-scale wage base, the two-tier structure is effectively built into American's pay structure. Thus, the first five years of the new seniority-based wage scale now provide dramatically reduced wages to pilots relative to pre-1983 agreements. Affidavit of Thomas Leto, R.60, ¶¶ 11-17.

2. *Proceedings Below.* Plaintiffs filed this complaint against American Airlines alleging that American violated section 2 of the Railway Labor Act, 45 U.S.C. § 152, by entering into an agreement that is inherently destructive of collective bargaining and by treating with other

than the exclusive bargaining representative of American's pilots. The complaint also alleges violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. Plaintiffs sought to certify the case as a class action. The district court had federal jurisdiction pursuant to 15 U.S.C. §§ 15 and 26, 28 U.S.C. §§ 1331 and 1337, 29 U.S.C. § 1132 and 45 U.S.C. § 152.

Plaintiffs subsequently filed a motion to certify the class, a motion to strike and a motion for summary judgment, based in part on the ground that Supplement B was illegal on its face. American filed a cross-motion for summary judgment and a motion to dismiss arguing that plaintiffs lacked standing to sue, that plaintiffs' claims were barred by the statute of limitations and that plaintiffs failed to state a claim for relief.

Several A-scale pilots then moved to intervene on the side of American to protect the guarantees secured for them by Supplement B. This motion was granted by the Court (the APA did not appear in the case). The district court stayed plaintiffs' motion to certify the proposed class.

Magistrate Judge Elaine Bucklo filed a Report and Recommendation that recommended denying American's motion to dismiss the complaint for failure to state a claim as to the RLA count. However, the Magistrate Judge recommended granting American's motion on other grounds, namely, finding that Supplement B was not inherently destructive of collective bargaining, because Magistrate Judge Bucklo believed that the Union

was free to secure the same wage and benefit levels for B-scale pilots as for A-scale pilots. Because the Magistrate Judge had held that Supplement B was not inconsistent with normal collective bargaining, she also recommended denying the plaintiffs' claims under the Sherman Act.

Both parties filed exceptions to the Report and Recommendation. On December 26, 1991, the district court entered an opinion essentially adopting the Report and Recommendation, and granting American's motion to dismiss and motion for summary judgment. However, as to the veto of the A-scale pilots over majority union action, the district court *sua sponte* decided that Supplement B did not give the A-scale pilots any such veto. In a footnote, the district court also denied the plaintiffs' motion to certify as moot.

Plaintiffs timely filed a notice of appeal. On March 24, 1993, the court of appeals affirmed the judgment of the district court, with minor modifications, on the ground that plaintiffs did not state a claim under the RLA where American simply honors the terms of an agreement with the APA that the APA itself has not challenged. Plaintiffs timely filed a petition for rehearing that was denied by the court on April 22, 1993.

## REASONS FOR GRANTING THE PETITION

The court of appeals' decision approves a collective bargaining agreement whereby a subgroup of A-scale pilots is given a permanent veto over any reduction in wages and benefits guaranteed to them by Supplement B to the Agreement, regardless of whether American and

the APA agree during subsequent contract negotiations to make such changes, or whether the APA believes such reductions to be in the best interest of the bargaining unit. Thus, in order to modify the provisions of Supplement B, American and the APA must also bargain with the A-scale pilots. It is an open question whether such a permanent waiver of the right to exclusive representation within the bargaining unit, even with the consent of the APA, violates federal labor law generally, and section 2 of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, specifically. Given the importance of this unresolved issue to the maintenance of industrial peace, and the fact that the permanent division of the bargaining unit required by Supplement B is in clear conflict with prior Supreme Court decisions, other courts of appeals, and longstanding federal labor policy, this Court should grant the petition.

1. The court of appeals expressly held that Supplement B does not give the A-scale pilots an illegal veto, or require tripartite bargaining over fundamental contract issues.[3] App. at 14a. The court's reasoning, however, is demonstrably flawed. The court below placed great weight on the fact that, as a now-majority of the Union, the B-scale pilots could effectively bargain to within one penny of the wage and benefit amounts provided to the A-scale pilots in Supplement B. Even assuming that the

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[3] Plaintiffs do not argue that Supplement B gives the A-scale pilots a veto as to all contract issues. Plaintiffs contend only that Supplement B requires that American and the APA bargain directly with the A-scale pilots if they wish to reduce the pay and benefit guarantees exclusively enjoyed by the A-scale pilots.

mere existence of irrevocable differentials between the two classes of pilots is not inherently divisive, *see* Affidavit of Clyde Summers, App. at 60a, ¶ 14, the court inexplicably ignores the converse, and arguably more relevant, bargaining reality. What the APA may *never* do, even if the B-scale pilots constitute the entire bargaining unit minus one, is bargain with American to reduce the wages or benefits guaranteed to the A-scale pilots. At that point, all concessionary bargaining must occur solely at the expense of the B-scale pilots, or with the express agreement of a majority of the A-scale pilots.[4] In effect, the A-scale pilots are able to externalize part of their cost of the Union's striking a deal with American to the B-scale pilots. Of course, the resulting discord between the pilots inures to the benefit of American. And the APA's ability to bargain is thus significantly constrained.

Although conveniently ignoring the imperative of its own syllogism, the court of appeals acknowledges that if the Union's B-scale majority believed the effects of Supplement B to be damaging, it "could try to *persuade* a majority of the A-scale pilots to vote away their rights under the 1983 Agreement." App. at 14a-15a (emphasis added). Inherent in the necessity to persuade is the

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[4] The specter of union "give-backs" is more than hypothetical. American previously attempted to eliminate the lump-sum distribution option in American's fixed pension plan. After the APA challenged American's unilateral action, the System Board of Adjustment determined that the termination violated the Agreement only as to the A-scale pilots, who were protected by Supplement B. Consequently, American restored the distribution option for the A-scale pilots. Second Smythe Decl., R. 57, Exh. 2, ¶ 8.

inability to impose. Yet this is precisely the ability fundamental to the notion of exclusive representation. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). If American and the Union must first obtain the approval of the A-scale pilots when it comes to bargaining on the issue of whether American can terminate its pension plan, for example, and they must do so according to the undisputed language of Supplement B, then the APA obviously is not the exclusive representative of the bargaining unit as to this issue.[5] The court of appeals is simply wrong to conclude otherwise.

Plaintiffs recognize, as does the court below, that many collective bargaining agreements provide superior benefits, or special voting rights, to discrete classes of workers within a bargaining unit. That is not the issue here. A bargaining representative can consent to such a bargaining structure if the interests of the bargaining unit

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[5] The court of appeals also denigrates the value of the wage and benefit guarantees in Supplement B, opining that as the number of A-scale pilots declines over time, so does the value of any A-scale concessions to American. This blunt calculus is not so obviously true, given the vigor with which American has defended even the penny differential between the two classes of pilots, which strongly, and correctly, suggests that there is great value in structure as well as result. The court fails to recognize the deleterious effects such structural divisions have on union harmony, and thus effective collective bargaining, *ab initio*. In any event, whatever their distant value, when the lone A-scale pilot remains active in the cockpit, it certainly is not true that the value of such concessions is insignificant either today or in the near future. Moreover, it simply is not the prerogative of the federal judiciary to determine for the bargaining representative the relative worth of its bargaining positions or the effectiveness of its negotiating strategy.

are fully and fairly represented. However, as the court of appeals correctly stated, "[t]he added wrinkle in plaintiffs' case is temporal: the guarantees are permanent." App. at 15a. The difference is critical. The real issue is whether the exclusive representative of a group of workers may *permanently* concede a portion of its ability to bargain on behalf of the members of the bargaining unit to a subgroup within the unit, thus divesting itself of the power to bargain bilaterally with the employer. The court of appeals' affirmative conclusion is contrary to well-established Supreme Court precedent, the decisions of other courts of appeals, and federal labor policy. For this reason, the petition should issue.

2. This Court has consistently held that the "principle of exclusive union representation, which underlies the National Labor Relations Act as well as the Railway Labor Act, is a central element in the congressional structuring of industrial relations." *Abood v. Detroit Board of Education*, 431 U.S. 209, 220 (1977) (footnote omitted). It is also true that under certain circumstances an employer may deal directly with members of the bargaining unit. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347 (1944) ("[i]t may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (direct dealing may be appropriate where there is great variation in the circumstances of employment or the capacity of employees). However, an employer who bargains with individuals within the bargaining unit without the consent of the bargaining representative, even where a majority of the

members approve, violates federal labor law. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944).

The issue before the court of appeals, and one which has not been resolved by this Court, is whether a bargaining representative may *consent* to waive irrevocably its obligation to act as the exclusive representative of the bargaining unit as to a subgroup within the unit. The court of appeals held that the permanently independent bargaining status conveyed to the A-scale pilots by Supplement B, no matter that changing circumstances may require that the Union and American "rebargain" the deal, does not violate the exclusive representation requirements of the RLA. The gist of the court of appeals' decision is that the exclusive bargaining representative may abdicate its responsibility to represent fully the interests of the bargaining unit, without leaving itself any future recourse to alter the agreement through collective bargaining with the employer. This remarkable holding is flatly inconsistent with the relevant decisions of this Court.

The Supreme Court has, without wavering, upheld the principle that exclusive representation is fundamental to the collective bargaining process. Moreover, collective rights "are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell*, 420 U.S. at 62. A union "has a legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as their separate interests." *Id.* at 70. This is because, "[h]aving divided

themselves, the minority employees will not be in a position to advance their cause unless it be by recourse seriatim to economic coercion, which can only have the effect of further dividing them along racial or other lines." *Id.* at 67. *See also J.I. Case*, 321 U.S. at 338 (practice and philosophy of collective bargaining looks with suspicion on individual advantages). This balkanization of power within the bargaining unit, and its concomitant weakening of the union, which the Court has consistently found objectionable, is also the inevitable result of Supplement B. And this Court has never sanctioned a collective bargaining agreement that not only granted a subgroup within the unit a veto as to certain issues, but also rendered the bargaining representative unable to modify the agreement within the normal course of collective bargaining, and without the necessity of negotiating additionally with a subgroup in the union.

The principle of exclusive representation is easily vitiated if an employer, due to temporary organizational weakness on the part of the union, or economic hardship in a particular industry, for example, can fortuitously lock in a permanent division in the bargaining unit. *Cf. Wonder State Mfg. Co.*, 151 N.L.R.B. 904, 912 n. 8 (1965) (violations of the NLRA cannot be excused on the ground of private inconvenience or economic and business exigencies). The Railway Labor Act wisely contemplates that bargaining units and employers will meet at reasonable intervals to discuss terms and conditions of employment. This ability to adjust the relationship between the parties to a collective bargaining agreement as circumstances change is a structural mechanism that functions as a crucial safety

valve in avoiding labor-management strife. It is the *process* of periodic collective bargaining, where both sides can engage in the unfettered rough-and-tumble of negotiations, that protects the integrity of the result by insuring that potentially divisive issues or subsequently unworkable agreements are timely revisited. As indicated above, this Court has consistently recognized the soundness of the rationale underlying this policy.

The court of appeals, on the other hand, has given its imprimatur to an agreement that intrudes profoundly, and disfavorably, upon the collective bargaining process, and the relationship between employees and their union. The APA has absolved itself permanently of an obligation that this Court has repeatedly held to be fundamental to an employee's right to bargain collectively – that his or her interests be represented exclusively by the bargaining representative. Under Supplement B, the APA simply cannot "rebargain" the wage and pension benefit guarantees at a point in the future without the consent of a majority of the A-scale pilots.[6] And it is the permanence of the veto that strips away the protections provided by the RLA, and renders the Agreement invalid.

The court of appeals queried why it should blame American for honoring a deal it made with the pilots'

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[6] It is important to note that the special guarantees given to the A-scale pilots are not *individual* guarantees, like ERISA-type pension benefits, but *collective* guarantees that run only to the A-scale pilots as a subgroup, effectively creating a de facto minority union. That is, if a majority of A-scale pilots vote to modify the guarantees, the individual dissenting A-scale pilots have no otherwise enforceable individual rights under Supplement B.

union in 1983, when the union is equally able to challenge that deal. App. at 15a. The question is misplaced. First, it is not clear that the APA is equally able to challenge Supplement B. Supplement B commits the Union to participate in defending the legality of the Agreement. More importantly, as this Court recognizes, inherent in any division of the bargaining unit is weakness and lack of cohesion. *See Emporium Capwell*, 420 U.S. at 70. If it were otherwise, Congress, and the courts, would be indifferent to whether an employer treated with other than the bargaining representative. Second, there is an independent public interest in the protection of an *employee's* right to bargain collectively through his or her exclusive representative underlying federal labor law, and that interest "may not be ignored by the employer, even though the employees consent." *Medo*, 321 U.S. at 687. Accordingly, American and the APA may not, by mere agreement, avoid the bargaining imperatives of the Railway Labor Act. Significantly, section 4 of the RLA permits individual plaintiffs to challenge agreements like Supplement B that "strike a fundamental blow . . . to the collective bargaining process itself." *See Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 442 (1989). Similarly, in *Emporium Capwell*, this Court found a failure to treat with the exclusive representative destructive of the employees' right to bargain collectively. Here, the potential entanglement of the employer into the relations between American's pilots is even greater, and certainly sufficient to support plaintiffs' cause of action.

Whether a collective bargaining agreement can, in any case, provide the A-scale pilots a right to veto any changes to Supplement B, while precluding forever any

possibility for the union to bargain collectively with American to amend the Agreement, is an important question of labor law that should be resolved by this Court. The permanent tripartite bargaining scheme (as to Supplement B issues) approved by the court of appeals "substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative." *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958). This ability renders the congressional scheme of collective bargaining toothless. Accordingly, the decision of the court of appeals is at odds with both the RLA and this Court's jurisprudence.

3. The decision of the court below is also in conflict with the decisions of other courts of appeals. In fact, no other appellate court has held that an employer and a union may permanently waive the union's right and obligation of exclusive representation. Rather, the federal courts have applied methods of analysis that strongly suggest that such a waiver is inconsistent with the policy underlying federal labor law. In *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 767 (1991), for example, the court held that an employer could not bargain to impasse over its ability to deal directly with individual employees as to lifetime job guarantees. In two previous collective bargaining agreements, the union had consented to such direct dealing by the employer, and the employer insisted that such a clause be included in the current agreement. Although the union did not consent to the employer's

demand, as here, the reasoning of the court in finding the employer's conduct in violation of the NLRA is equally relevant in arguing against the extraordinary encroachment upon the relationship between the pilots and their union ratified by the court below. The court found the disputed clause to be

> particularly offensive to the principle of collective bargaining because it would put the employer in a position to exert a highly divisive force among the members of the bargaining unit . . . . The clause thus not only displaces the Union from its representational role, it also gives the Employer the opportunity to destroy the cohesiveness of the Union's membership.

*Id.* at 1224.

This is precisely the standard of inquiry followed by the Supreme Court in determining whether an employer is in violation of its obligation to treat exclusively with the bargaining representative. The relevant question is whether the agreement at issue would put the employer in a position to be a highly divisive force among the members of the bargaining unit. The flaw in the reasoning of the court below is that it stopped its analysis once it concluded that the APA had consented, in 1983, to the terms of Supplement B. Typically, where the parties to the agreement have the power to "rebargain" through the normal collective process, this determination would be dispositive because the ability of the union to revisit its prior agreement serves to attenuate the discord inherent in any division of the bargaining unit. Here, however, that ability is expressly proscribed by the terms of Supplement B, which make permanent the veto rights of the

A-scale pilots. Thus, the process-dependent mechanism regarded as crucial by both the Supreme Court and the *Toledo* court to protect the right of employees to bargain collectively is absent. The failure of the court below to recognize this critical distinction, inconsistently with other courts of appeals, is fatal to its analysis. *See also Reichhold Chemicals v. NLRB*, 953 F.2d 594 (11th Cir. 1992) (bargaining to impasse over employer's right to deal with separate subgroups on certain issues unacceptably undermines union's role as exclusive representative); *Seaboard World Airlines v. Transport Workers Union*, 425 F.2d 1086 (2d Cir. 1970) (permanent waiver of right to bargain further on any matter including guarantees to senior navigators, does not violate the RLA where the agreement could be altered by the written consent of the parties).

4. The decision of the court of appeals is also contrary to longstanding federal labor policy. Although the APA agreed with American that the A-scale pilots would have an irrevocable veto over any reduction in the wage and benefit amounts guaranteed in Supplement B, as demonstrated above, the real question is whether American and the APA could enter into such an agreement. Federal labor policy unequivocally says not. The National Labor Relations Board has repeatedly held that "[j]ust as a certified union may not avoid its duty to represent all employees in the certified unit, it may not relieve itself of this obligation by bargaining away the corresponding right acquired through certification." *Wilford Auto Sales, Inc.*, 106 N.L.R.B. 1396, 1398 (1953); *see also Westinghouse Air Brake Co.*, 123 N.L.R.B. 859, 860 (1959) (union could not bargain away its obligation to represent all the

employees covered in the certified unit, either voluntarily or involuntarily). Moreover, any agreement that purports to deprive employees of their right to exclusive representation will not be given effect. *Wilford Auto Sales*, 106 N.L.R.B. at 1398.

As the affidavit of Professor Summers also makes clear, the terms of Supplement B, which impose an "unprecedented" two-tier structure on the APA, App. at 66a, "contradict[] the principle and purpose of exclusive representation adopted by the Railway Labor Act." App. at 69a. Professor Summers forcefully concludes that by giving the A-scale pilots a permanent veto over certain union and employer decisions, thereby requiring tripartite bargaining as to some issues, Supplement B renders the Union unable to "develop the unity needed to act effectively and responsibly," splitting the APA into "two antagonistic groups with adversarial interests." App. at 66a. Not surprisingly, a collective bargaining agreement that by its very structure creates such internal disharmony is "contrary to the letter, the spirit and the purpose of our statutory system of collective bargaining." App. at 69a.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**In The**

**United States Court of Appeals**

For the Seventh Circuit

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No. 92-1213

PAUL RENNEISEN, et al.,

*Plaintiffs-Appellants,*

*v.*

AMERICAN AIRLINES, INC.,

*Defendant-Appellee.*

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 90 C 5930 – **Ilana D. Rovner,** *District Judge.*

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ARGUED NOVEMBER 3, 1992 –
DECIDED MARCH 24, 1993

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Before CUMMINGS and MANION, *Circuit Judges,* and WOOD, JR., *Senior Circuit Judge.*

CUMMINGS, *Circuit Judge.* In 1983, American Airlines was losing money in the wake of airline deregulation and rising fuel prices. In order to cut labor costs, it struck a deal with the pilots' union. The union, Allied Pilots Association, relinquished wage and benefit guarantees for pilots not yet hired; in return American promised to preserve the wages and benefits of current pilots. On

November 4, 1983, American and the union memorialized their deal in an "Agreement" that divided the union into A-scale pilots with wage and benefit guarantees, hired before November 4, and B-scale pilots without guarantees, hired afterwards. The Agreement further provided that the A-scale pilots' guarantees would not be rebargained unless a majority of the A-scale pilots voted to do so.

Plaintiffs are several B-scale pilots who sued American, claiming that the Agreement with the pilots' union is an illegal restraint on collective bargaining under Section 2 of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, and an illegal restraint of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1. The RLA sends most disputes between transit workers and their employers to arbitral boards, so that district courts have limited jurisdiction over RLA claims. Because plaintiffs could not show that the Agreement struck "a fundamental blow to union or employer activity and the collective bargaining process itself" under *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 442, the district court dismissed plaintiffs' case for lack of jurisdiction. Without the RLA's support, plaintiffs' other counts crumbled as well: the district court found that antitrust labor exemptions barred plaintiffs' Sherman Act claims, and dismissed as moot plaintiffs' motion to certify all B-scale pilots as a class. Plaintiffs appeal these dismissals.

We conclude that plaintiffs have sued American because they cannot persuade their own union to challenge an Agreement that gives more security to other workers in the union. Accordingly, we hold that plaintiffs have not stated a claim for which relief can be granted

because RLA Section 2 does not give minority groups in a union a cause of action against their employer for adhering to agreements that the union decides not to challenge. Although the district court erred in concluding that it lacked jurisdiction to hear this case, its careful substantive analysis supports our dismissal of plaintiffs' case under Fed.R.Civ.P. 12(b)(6) for failure to state a claim.

I.

In 1983, American lay supine, pinned by rising fuel costs and a fleet of aging, inefficient aircraft, while lower-cost carriers empowered by airline deregulation penetrated deeper into its market share. American states that between 1978 when deregulation began and 1983, its fleet shrank by 10 percent, it furloughed 10 percent of its pilots and it hired no new pilots (defendant's brief at 3). American believed that fuel and capital improvement costs (aircraft maintenance and replacement) were relatively fixed industry-wide, but that labor costs were about 35 percent of its total budget, as against 20-25 percent for the low-cost carriers. To halt its declining market share and escape the threat posed by low-cost carriers, American decided it needed to cut labor costs. To this end, it consummated agreements with all its unions, including the pilots' union.

The agreements shared a common premise: protect the wages and benefits of current workers, but hire new workers at "market" rates that matched more closely the wages and benefits paid by low-cost carriers. American styled this a "two-tier" proposal; it reached two-tier agreements with the mechanics' union in February of

1983, and with the flight attendants' and pilots' unions in November of 1983. The Agreement between the pilots' union and American, dated November 4, 1983, provided:

> A. JOB SECURITY * * *
>
> The Company [American] will guarantee employment and * * * job security forever * * * to all pilots * * * who were on * * * active flight payroll on November 1, 1983 * * *
>
> * * *
>
> B. PAY AND RETIREMENT BENEFIT PROGRAMS FOR PILOTS HIRED PRIOR TO NOVEMBER 1, 1983
>
> 1. The company agrees that it will take no action * * * to diminish the pay or the retirement benefit programs [of] pilots hired prior to November 1, 1983 * * *
>
> 2. This agreement * * * shall remain in effect so long as any pilot with job security remains in the [Company's] active employ * * * [but] this Agreement may be changed by unanimous agreement between the parties and a majority of the pilots with job security * * *
>
> * * *
>
> C. Nothing contained herein shall * * * restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the [A-scale and the B-scale] pilots * * *, provided, however, that

> neither party will attempt to totally eliminate the existing differentials.[1]

Under other provisions of the Agreement, the pilots relinquished a 7 percent wage increase and accepted a reduced rate of vacation accruals. American promised to recall all furloughed pilots, and to add 200 planes to its fleet of 238. American's plan to cut labor costs and make capital investments in its fleet was an unqualified success. Today American is a leader in the airline industry. Its success has allowed it to hire many new pilots – 59 percent of its pilots in fact – since it negotiated the Agreement with the pilots' union.

Since 1983 the pilots' union and American have met four times to negotiate the differentials between A-scale and B-scale pilots, most recently in 1991. American contends that as of 1991, the differentials have for practical purposes been eliminated, and that the A- and B-scale designations function as an integrated seniority system where senior B-scale pilots have effectively the same wages and benefits as A-scale pilots. The seven plaintiffs argue that differentials remain, and, more fundamentally, that the pilots' union is weakened and divided by the Agreement, to the point that the Agreement unlawfully restrains the pilots' ability to bargain collectively in violation of the RLA.

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[1] The pleadings, briefs and opinion below denote the contested parts of the Agreement as "Supplement B". Supplement B is entitled "Agreement" and contains subheadings A, B and C, so that we refer to it as "the Agreement" to avoid confusing it with sub-heading B.

Congress enacted the RLA in 1926 to ensure that labor unrest would not disrupt transportation networks so vital to the nation's economy. The Act sought to give labor and transportation companies a framework to resolve disputes peacefully through protracted negotiations and compulsory mediation rather than through strikes. 45 U.S.C. § 151(a); Theodore Kheel, 9 *Labor Law* § 50.02. Congress extended the RLA to include air carriers in 1936. 45U.S.C. § 181. The RLA focuses on establishing certified representatives for employee groups in the transportation industry, and on monitoring the process of collective bargaining between the representatives and the employers. Sections 3 and 4 of the RLA constitute an administrative agency, the National Mediation Board (NMB), to supervise "major" disputes about union representation or contract formation, and an arbitral tribunal, the National Railroad Adjustment Board (NRAB), to settle "minor" disputes about the interpretation of existing contracts. 45 U.S.C. §§ 153-155. See *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 491 U.S. 299, 302-303; *Brotherhood of Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 35; *Elgin, J. & E. Railway v. Burley*, 325 U.S. 711, 723. The RLA also creates detailed procedures for resolving disputes before the NMB or the NRAB; Section 2 lays out general ground rules, and Sections 5-9 set forth the specific requirements applicable to mediation or arbitration. 45 U.S. C. §§ 152, 155-159.

Plaintiffs' complaint alleges that the Agreement's thirty-year waiver of the right to rebargain A-scale guarantees violates parts First and Fourth of RLA Section 2. Part First orders carriers and employees to make reasonable efforts to settle disputes; part Fourth empowers

employees to bargain collectively through their representatives, and forbids carriers from "interfer[ing] in any way with the organization of its employees." Plaintiffs' complaint also alleges that American violated part Ninth of RLA Section 2 by bargaining separately with a party (the A-scale pilots) that is not the pilots' designated representative. Part Ninth provides that disputes over the identity of authorized representatives will be investigated by the NMB, and that carriers must deal exclusively with the certified representative of its employees.

Plaintiffs make three arguments about how the Agreement works to undermine collective bargaining. First, they complain that the Agreement forces B-scale pilots to make all the concessions in contested areas such as pension benefits and health-care costs because the A-scalers have locked-in guarantees. Plaintiffs offer an alternative statement of the same problem by asserting that the Agreement gives A-scale pilots an illegal veto over any concessions the B-scale pilots might propose, forcing tripartite bargaining on fundamental contract issues. Second, plaintiffs challenge the Agreement's term: A-scale guarantees will exist until the last A-scale pilot leaves American, which could take 30 years or more. Since these guarantees are not subject to rebargaining unless a majority of the A-scale pilots vote them away, plaintiffs argue that this creates a 30-year waiver of the right to bargain that is void under federal labor policy. Third, plaintiffs assert that the Agreement serves no business purpose today save to weaken the union; because it has outlived whatever imperatives impelled its formation, it must be discarded.

The heart of plaintiffs' complaint appears to be that giving part of the union guaranteed benefits and wages undermines the entire union's ability to bargain as an effective unit, regardless of the actual disparities between the two groups. However, we did find one reference in plaintiffs' briefs to an existing disparity between A-scale and B-scale benefits. In 1987, American tried to rescind a "lump-sum distribution option" of the pilots' pension plan. After the A-scale pilots objected, an arbitrator found that the Agreement barred American from revoking the lump-sum option for A-scale pilots (plaintiffs' brief at 11). Plaintiffs do not say whether American ultimately revoked the option for B-scale pilots or whether the differential still exists. Beyond this, the only concrete disparity between A-scale and B-scale wages and benefits seems to be that the former group of employees possesses guarantees the latter lack.

II.

Plaintiffs confront a threshold hurdle: does a district court have jurisdiction under the RLA to hear this case? The district court found it did not. Incredibly, plaintiffs' jurisdictional statement asserts that "jurisdiction was not disputed" (plaintiffs' brief at 5). Because the district court denied jurisdiction in part by evaluating the substance of plaintiffs' claims, plaintiffs may perhaps be forgiven for plunging straight into the merits. But their briefs do not offer independent discussion of this central issue, confiding their arguments instead to invectives directed against the Agreement. We stress as we have before that a district court's lack of subject matter jurisdiction cannot be cured by agreement of the parties. *Metropolitan Life Insurance Co.*

*v. Estate of Cammon*, 929 F.2d 1220, 1222-1224 (7th Cir. 1991). Parties should address jurisdictional questions directly in the materials they present to this Court – especially when they lose on this ground below.

This Court's previous encounters with the RLA establish that "[t]he scope of federal courts' jurisdiction over RLA violations is limited * * * ." *Brotherhood of Railway Clerks v. Atchison, Topeka and Santa Fe Railway*, 847 F.2d 403, 408 (7th Cir. 1988). The district court read *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 ("*TWA*"), to counsel dismissal of plaintiffs' claims, but *TWA* cannot support a denial of jurisdiction in the present case. *TWA* reviewed conduct that unions and employers engage in after they have completed compulsory RLA mediation and failed to settle their differences. Under the RLA, in major disputes employers or unions may resort to what is called "self-help" once negotiations break down. These efforts seek to gain economic leverage over the bargaining opponent; the union strikes, and the employer tries to wait out the strike. One party may complain that the other's tactics violate some provision of the RLA. In *TWA*, for example, the union asserted that the Employer violated RLA Section 1 Fourth by offering certain seniority and placement preferences to flight attendants who returned to work before the strike was over. *TWA* held that the airline's actions did not interfere with employees' right to bargain collectively, and consequently did not violate Section 2 Fourth. *Id.* at 443. *TWA* did not find that the trial court lacked jurisdiction to hear the union's claims; the union lost on the merits because the employer's actions were lawful. *TWA* therefore does not support the district

court's reasoning. It is not about jurisdiction, and its facts concern post-mediation self-help challenged by a union, rather than a collective bargaining agreement challenged by a non-representative party as in the present case.

The district court cited *TWA* correctly for the proposition that Section 2 Fourth "address[es] primarily the pre-certification rights and freedoms of unorganized employees." *Id.* at 440. *TWA* emphasized that Section 2 Fourth was designed to protect workers who had not yet organized an RLA-certified union. But the district court then transformed an observation about Section 2's substantive focus into a heightened jurisdictional barrier, concluding that where pre-certification conduct was not at issue, "jurisdiction under Section 2 Fourth is limited to actions * * * that constitute 'a fundamental blow to union or employer activity and the collective bargaining process itself.' " 1991 Westlaw 285283 at 11, quoting *TWA* at 442. This misconstrued *TWA*. That case said only that the RLA was silent on the scope of allowable self-help, and that courts should hesitate to "imply limitations on all but those forms of self-help that strike a fundamental blow" to collective bargaining – revealing that *TWA* offered this phrase to help courts analyze the merits of self-help actions, and not to determine if a court has jurisdiction in the first instance. *TWA* at 442.

Other parts of *TWA* suggest the proper analysis to determine whether a federal court has jurisdiction to hear an RLA claim. *TWA* acknowledged that in some cases self-help might run afoul of the RLA. By implication, a party challenging self-help would lack a remedy unless a federal forum were available, because self-help occurs after parties have complied with the RLA's mandatory

dispute resolution scheme. *TWA*, 489 U.S. at 442. *TWA*'s jurisdictional test can be found then in its statement that "judicial intervention in RLA procedures [is] limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy * * * .' " *Id.* at 441, quoting *Switchmen v. National Mediation Board*, 320 U.S. 297, 300. To determine whether the district court had jurisdiction, we must ask whether plaintiffs would have a remedy against American absent the jurisdiction of federal courts. If plaintiffs could bring their RLA claims before the NMB or the NRAB, then the trial court lacked jurisdiction because the RLA mandates a statutory forum for plaintiffs' claims.

Plaintiffs here have no remedy under the RLA except a review in federal court, and hence the district court had jurisdiction to hear their claims. This result follows *Air Line Pilots Association v. UAL Corporation*, 874 F.2d 439, 444-445 (7th Cir. 1989) ("UAL"), which held that one union had jurisdiction to challenge a second union's collective bargaining agreement as a violation of the first union's right to bargain. Much like the present case, the pilots in UAL were not certified to challenge the collective bargaining agreement they protested. They claimed that their employer had breached its duty to bargain collectively with them by striking the agreement with the other union. Also like the present case, the UAL pilots brought a "major" attack on the validity of an existing collective bargaining agreement, rather than a "minor" grievance over an agreement's interpretation. We noted above that major disputes typically fall under the NMB's jurisdiction, while minor grievances are heard by the NRAB. Here, however, plaintiffs could not bring a major

dispute under Section 6 because they are not an RLA-certified representative. 45 U.S.C. § 156. This in turn suggests that the NMB would not hear their complaint under Section 5.[2] 45 U.S.C. § 155. In sum, "where the arbitral board cannot provide a remedy that will protect a party from the consequences of [an RLA violation], the district court has equitable jurisdiction to do so * * * ." *Id.* at 445.

*Brotherhood of Railway Clerks v. Atchison, Topeka and Santa Fe Railway*, 847 F.2d 403 (7th Cir. 1988), supports today's analysis. That case affirmed that the district court lacked jurisdiction because the RLA required the union and the employer to bring their minor dispute before the NRAB. *Id.* at 409; see *Chicago River & Indiana Railroad*, 353 U.S. at 39. The employer and the union disagreed as to whether their collective bargaining agreement allowed the employer to "buy" employees out of union-negotiated contracts. We found that the NRAB had exclusive jurisdiction over the case because it involved the interpretation, not the validity, of a collective bargaining agreement. *Id.* Because the union had an arbitral remedy, the district court lacked jurisdiction: "[i]n those disputes in which the RLA's extra-judicial dispute-resolution mechanisms are capable of adequately protecting the rights of the parties, federal courts may not interfere

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[2] *UAL* did not suggest that the NMB was the proper forum to hear the pilots' third-party challenge to a collective bargaining agreement. 874 F.2d at 443-445. We follow *UAL*, therefore, in assuming that the NMB does not take jurisdiction over complaints that are not brought by certified representatives under the RLA. If the NMB had statutory jurisdiction over the present dispute, of course, the courts would lack jurisdiction.

* * * ." *Id.* Here plaintiffs seek to suspend a collective bargaining agreement, and they cannot do so under Section 6 because they are not a certified representative under the RLA. Since neither the NMB nor the NRAB offers a forum for their claims, the trial court had jurisdiction to hear the claims, just as it did in UAL. 874 F.2d at 444-445.

We note that the district court also erred when it implied that the present dispute was "minor" because it was not "likely to lead to a pilots' strike." 1991 Westlaw 285283 at 18. We pointed out before that this is not the test. *UAL,* 874 F.2d at 444. Minor disputes occur over contract interpretation. See *Chicago & North Western Transportation Co. v. Railway Labor Executives Ass'n,* 908 F.2d 144, 148 (7th Cir. 1990); *National Railway Labor Conference v. International Ass'n of Machinists,* 830 F.2d 741, 745-746 (7th Cir. 1987). Plaintiffs do not raise any issues about how to interpret the Agreement; rather, they challenge its validity and seek an injunction to render it void. This is a classic "major" dispute and therefore outside the NRAB's arbitral authority.

III.

After finding that it lacked jurisdiction, the district court offered a careful substantive analysis of plaintiffs' claims, and we read its opinion to support a conclusion that the RLA does not offer plaintiffs any relief from the Agreement. This case must be dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted RLA Section 2 was not designed to give minority groups within a union a cause

of action against their employer when they cannot persuade their own union to take actions they deem to be in the union's best interest. Since plaintiffs' own union has not challenged the Agreement, we cannot find that the Agreement violates the union's right under the RLA to bargain collectively for its members.

The district court property rejected plaintiff's claim that the Agreement waives the right to bargain on fundamental contract issues. As Judge Rovner pointed out, the 1983 Agreement expressly allows the union to seek A-scale wages and benefits for the B-scale pilots: "Nothing contained herein shall be deemed to restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the pilots * * * hired on or after November 1, 1983, provided, however, that neither party will attempt to totally eliminate the existing differentials." The district court read this to require a one-penny differential to remain between A-scale and B-scale wages, and we agree. The Agreement does not waive the right to bargain on any significant issues that could support a cause of action under RLA Section 2 Fourth.

The district court was also correct to find that the Agreement does not give A-scale pilots an illegal veto over contract issues, and does not require tripartite bargaining on fundamental contract issues. The court observed that B-scale pilots comprise 59 percent of the union's membership, and as such can bargain and vote for any contract within one penny of A-scale pay and benefits. We again agree. Furthermore, if most B-scale pilots agreed with plaintiffs about the damaging effects of the Agreement, the B-scale pilot majority could try to

persuade a majority of the A-scale pilots to vote away their rights under the 1983 Agreement. As time passes and B-scale pilots become an ever-larger percentage of the union, the A-scale guarantees will fade into insignificance. Even if the existence of A-scale and B-scale groups makes it more difficult for the union to agree on its negotiating position today, plaintiffs' arguments about 30-year tripartite bargaining are baseless because the value of A-scale concessions to American can only decline as the percentage of A-scale members shrinks.

Plaintiffs' claims against American cannot succeed because their own union and American are equally "guilty" of adhering to the 1983 Agreement. One question dooms plaintiffs' case: why blame American for honoring a deal it made with the pilots' union ten years ago, when the union is equally able to challenge that deal and American has nothing to gain by trying to revoke the A-scale pilots' guarantees? Plaintiffs in their briefs attack the A-scale guarantees with particular ire. The guarantees offer super-seniority to A-scale pilots. We see nothing sinister and nothing contrary to the RLA or federal labor policy in an agreement that permanently gives benefits to a shrinking percentage of a union's membership. Plaintiffs' effort to compare locked-in benefits to a permanent waiver of the right to bargain in the first instance borders on outrageous. Many union agreements allocate superior benefits to certain groups of workers. The added wrinkle in plaintiffs' case is temporal: the guarantees are permanent. From the perspective of the union in 1983, however, permanent guarantees for the 1983 pilots were far preferable to negotiable guarantees. Plaintiffs now seek to blame American for their union's success ten years ago.

*Air Line Pilots Ass'n v. O'Neill*, 111 S.Ct. 1127, suggests that American cannot be liable for honoring its Agreement with the union. *O'Neill* holds that a union does not breach its duty of fair representation unless it acted "arbitrarily and irrationally" in reaching a settlement with the employer, and "a settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement." *Id.* at 1136 (emphasis in original). In *O'Neill*, at least, the Court was able to conclude with the benefit of hindsight that the union had struck a bad settlement. In the present case, however, A-scale pilots moved to intervene to protect their rights under the 1983 Agreement,[3] and we are not persuaded that the 1983 Agreement was a bad deal for the union in the long run. *O'Neill* suggests that plaintiffs should not be able to sue American for adhering to an Agreement with the union where the Agreement does not violate the union's duty of fair representation and it has not been challenged by the plaintiffs' own union.

*United Independent Flight Officers, Inc. v. United Airlines, Inc.*, 756 F.2d 1262, 1269-1273 (7th Cir. 1985), furnishes further evidence that an employer cannot be vicariously liable for an Agreement that the union itself has not challenged. There a pilot group sued its union for breach of the duty of fair representation and named United Airlines as a party to that breach. The pilot group attacked the tax implications of a lump-sum pension distribution option that had been negotiated by the union

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[3] In a minute order dated December 21, 1990, the district court allowed the group of A-Scale pilots to intervene for the limited purpose of responding to motions.

with the company; the benefits at issue and the parties' alignment were very similar to the present case. The pilot group lost because their claims were not timely; we found that a six-month statute of limitations applied to duty of fair representation claims. *Id. United Independent Flight Officers* suggests that where a union has not challenged an agreement, a minority group of employees cannot sue their employer under RLA Section 2 for honoring an agreement that does not violate the union's duty of fair representation.

For these reasons, we hold as a matter of law that under RLA Section 2 First and Fourth, American does not refuse to bargain or interfere with the union's right to bargain collectively when it honors the terms of an agreement with a union that the union itself has not challenged. Since plaintiffs concede that their Sherman Act claims must be dismissed if their RLA claims fail (plaintiffs' brief at 26-27, reply brief at 23), their case has expired. The district court's dismissal of plaintiffs' case is AFFIRMED subject to the minor modifications noted in this opinion.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventh Circuit*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| PAUL F. RENNEISEN, THOMAS FRANK LETO, LAWRENCE M. KAMPA JR., ARPAD E. HORVATH, KARL BORK, CARL W. BATTIS, AND JOHN H.N. WHATLEY, individually and on behalf of all similarly situated persons, | ) | |
| Plaintiffs, | ) | No. 90 C 5930 |
| v. | ) | Hon. Ilana D. Rovner |
| AMERICAN AIRLINES, INC., a corporation, | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

## I. INTRODUCTION

This unusual case involves a dispute between a group of airline pilots hired after November 1, 1983 and their employer, American Airlines ("American"), over the effects of a union contract signed before the pilots were hired. The contract, signed by American and the Allied Pilots Association (APA), contained salary and pension guarantees to pilots hired before, but not after, November 1, 1983. The plaintiffs, six post-1983 pilots, filed a three count complaint against American alleging violations of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, the Sherman Act, 15 U.S.C. § 1, *et seq.*, and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.

§ 1140. The plaintiffs filed a motion to strike and a motion for summary judgment.[1] American countered with a motion to dismiss and a motion for summary judgment. The Court then referred the case to Magistrate Judge Elaine Bucklo for a report and recommendation. The Court has received that report, and the Magistrate Judge has recommended that American's motion for summary judgment and motion to dismiss be granted, and that plaintiffs' motion for summary judgment and to strike be denied. Both parties have filed timely objections to the report of the Magistrate Judge. After consideration, the Court will adopt the report and recommendation of the Magistrate Judge and grant dismissal and summary judgment in favor of American.

## II. FACTS

In 1983, American was at a financial and operational crossroads. Deregulation of the airline industry in 1978 brought a number of new, low-cost carriers into the air transport marketplace. Due to the increased competition, American experienced a reduction in its operating revenues. At the same time, American's fuel costs were increasing for its aging, fuel-inefficient aircraft.

American's projections for its future operations reflected stagnant growth. In 1983, American operated 238 aircraft and projected that the fleet would consist of no more than 250 aircraft by 1988. In order to compete

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[1] The plaintiffs have also moved to certify as a class all post-1983 American pilots. Because of the Court's decision in this case, that motion is denied as moot.

against the low-cost carriers, American decided that its only course was to lower its labor costs and upgrade its aircraft fleet. American presented the APA with two options. American wanted either dramatic work rule and wage concessions or a two-tier system which would guaranty [sic] pre-1983 pilots job security as well as pay and pension benefits at the 1983 level but would provide lower pay rates and benefits for future pilots. As part of the agreement reached on November 4, 1983, which implemented the two-tier approach, the APA agreed to forego a seven percent wage increase due in November 1983 and to accept a reduction in the rate of vacation accrual for pre-1983 pilots. American and the APA entered into an agreement referred to as Supplement B. In relevant part, this contract provides as follows:

> WHEREAS, the Company and the Association recognize the problems that have arisen as a result of deregulation of the airline industry; and
>
> WHEREAS, the parties recognize that innovative approaches must be used in order to assure employees and management that the Company shall remain competitive in a changed economic environment; and
>
> WHEREAS, the Company and the Association acknowledge the contributions that each has made over the past years to the status of the Company as a leading air carrier; and
>
> WHEREAS, the current pilot group through the Association has made significant concessions with respect to its established contract

rights which are designed to permit the company to compete effectively over the indefinite future;

NOW, THEREFORE, the parties hereby agree to the following terms . . . :

A. JOB SECURITY

1. General

The Company will guarantee employment and grant system job security forever as a pilot to all pilots covered by the Basic Agreement who were on the Company's active flight payroll on November 1, 1983. . . .

* * *

B. PAY AND RETIREMENT BENEFIT PROGRAMS FOR PILOTS HIRED PRIOR TO NOVEMBER 1, 1983

1. The Company agrees that it will take no action, at any time, by way of notice, negotiations or otherwise, to diminish the pay or the retirement benefit programs in effect on the date hereof for pilots hired prior to November 1, 1983. . . .

2. This Agreement as provided herein shall remain in effect so long as any pilot with job security remains in the active employ of the Company. . . . [T]his Agreement may be changed by unanimous agreement between the parties and a majority of the pilots with job security and guarantee of employment. . . .

* * *

> C. Nothing contained herein shall be deemed to restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the pilots in the employ of the Company prior to November 1, 1983 and those hired on or after November 1, 1983, provided, however, that neither party will attempt to totally eliminate the existing differentials.

Thus, Supplement B provided for pay and pension guarantees for pre-1983 pilots. Under a separate agreement – one not challenged in this case – post-1983 pilots were also to be paid lower "B-scale" rates, while pre-1983 – pilots "A-scale" pilots – received the higher, existing contract rates.

In 1985, 1986, 1987 and 1991, the APA and American met in collective bargaining and reduced the differentials between the pre- and post-1983 pilots. For example, the A-scales and B-scales have been merged into one seniority based pay scale. In part because of these concessions, American has hired 5,254 of its 8,877 pilots, or 59% of the total, since 1983.

In their complaint, plaintiffs allege that Supplement B is an illegal waiver of their right to bargain in violation of Section 2, First, Fourth, and Ninth of the RLA, 45 U.S.C. § 152. According to the complaint, "B-scale pilots could not seek parity even as an opening bid in negotiations, (sic) the normal dynamics of a bargaining process ensured that the outcome would always be substantially below even 'near-parity.' " Complaint ¶ 26. To bring this cause of action within the language of Section 2, Fourth, the complaint states that "Supplement B has allowed

American to destroy the union's community of interest to such an extent that American could dominate or control the A.P.A. insofar as it was the bargaining agent of the B-scale pilots." Complaint ¶ 25. According to the complaint, American has allegedly refused to bargain in good faith by insisting on Supplement B restrictions. Complaint ¶ 30. Furthermore, the complaint alleges that the adoption and enforcement of Supplement B violates Section 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Finally, the plaintiffs argue that Supplement B provides unlimited bargaining rights to A-scale pilots but sharply limits the bargaining rights of B-scale pilots for an indefinite period in violation of ERISA.

## III. REPORT OF THE MAGISTRATE JUDGE

On the plaintiffs' RLA claim, the Magistrate Judge addressed only Section 2, Fourth, 45 U.S.C. § 152, because the plaintiffs' claims based on alleged violations of Section 2, First and Ninth did not add any rights not already covered by Section 2, Fourth. The plaintiffs have made no objection on this account. The Magistrate Judge concluded that plaintiffs did not state a cause of action under Section 2, Fourth. The Magistrate Judge interpreted Supplement B to require that at most a one penny differential must remain between the pay and benefits given to A-scale pilots and B-scale pilots for the life of the agreement, which expires with the retirement or death of the last A-scale pilot or by agreement of a majority of active

A-scale pilots, the APA and American.[2] According to the Magistrate Judge, a thirty-year waiver in a labor contract related to such "minutiae" is not a fundamental attack on the bargaining process or an attempt to destroy the union in violation of Section 2, Fourth. (Report of Magistrate at 8, *citing National Railroad Passenger Corp. v. Int'l Assoc. of Machinists & Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990)). In addition, the Magistrate Judge concluded that the fact that one group has permanent protection for its decision is not illegal. (Report of Magistrate at 8, *citing, Seaboard World Airlines, Inc. v. Transport Workers Union of America*, 443 F.2d 437 (2nd Cir. 1971)). The Magistrate Judge concluded that because Supplement B does not prohibit post-1983 pilots – who now constitute a majority of pilots – from bargaining for any benefit they want, plaintiffs have failed to state a claim under Section 2, Fourth.

On the antitrust claim, the Magistrate Judge concluded that both the statutory and non-statutory labor exemptions to the antitrust laws require dismissal of the claim. (Magistrate's Report at 10, *citing United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Mid-America Regional Bargaining Assn. v. Will County Carpenters District Council*, 675 F.2d 881 (7th Cir. 1982)). On the ERISA claim, the Magistrate Judge stated that plaintiffs have not been

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[2] In their Statement of Undisputed Facts, the plaintiffs concede that "[o]ver the thirty years, American and APA can change the differential between the two tiers, and in theory, the differential could be even a penny, but some differential must exist." Plaintiffs' Statement of Undisputed Facts, ¶ 2. As stated in the Report and Recommendation, the Magistrate Judge considered this statement even though the plaintiffs filed it late.

constructively discharged or received a similar employment injury and therefore have no such cause of action. (*Magistrate's Report at 12, citing Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *Young v. Standard Oil (Indiana)*, 660 F. Supp. 587, 597 (S.D. Ind. 1987), *aff'd*, 849 F.2d 1039 (7th Cir. 1988), *cert. denied*, 488 U.S. 981 (1988)). The plaintiffs have not objected to the Magistrate Judge's recommendation regarding the dismissal of the ERISA claim.

The Magistrate Judge recommended that American's motion for summary judgment and motion to dismiss be granted and that plaintiffs' motion to strike and motion for summary judgment be denied.

## IV. ANALYSIS

### A. Jurisdiction Under Sections 2, Fourth

Regarding the RLA claim, the plaintiffs' brief essentially presents two objections. The first is that Supplement B gives pre-1983 pilots an illegal veto power which requires tripartite bargaining as to fundamental contract issues. The second is that a thirty year waiver of the right to bargain on any subject that is normally bargained for at reasonable intervals amounts to an illegal indenture under federal labor policy. American objects to the Magistrate Judge's Report on the ground that plaintiffs have not stated a claim under Section 2, Fourth of the RLA, as assumed by the Magistrate Judge. Because the Court agrees with the recommendation of the Magistrate Judge, the Court need not address this objection by American.

The first – and in this case determinative – issue that the Court must address in considering both of the plaintiffs' objections to the Magistrate Judge's recommendation regarding the RLA claim is whether the Court has jurisdiction to hear this claim. The proper route for complaining about a statutory violation – as the plaintiffs do in this case – is a suit in federal district court, not a proceeding before an adjustment board or other arbitral body that would ordinarily review a minor dispute.[3] *See Air Line Pilots Assoc., Internat'l v. UAL Corp.*, 874 F.2d 439, 444 (7th Cir. 1989). Even so, review of RLA violations is quite narrow and limited to exceptional circumstances. *Brotherhood of Ry., Etc. v. Atchison, T. & S. F. Co.*, 847 F.2d 403, 408-09 (7th Cir. 1988).

Plaintiffs in this case allege that American has violated Section 2, Fourth, which provides, in pertinent part:

> No carrier, its officers or agents, shall deny or in any way question the right of its employees to

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[3] This dispute is not major in the sense that it is likely to lead to a pilots' strike. *Air Line Pilots Assoc., Int'l v. UAL Corp.*, 874 F.2d 439, 444 (7th Cir. 1989). A major dispute relates to "the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls a controversy." *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723, 65 S. Ct. 1282, 1289 (1945). A minor dispute "contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or an omitted case." *Id.*

> join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . . "

45 U.S.C. § 152, Fourth. Congress enacted this provision as part of the 1934 amendments to the RLA. 48 Stat. 1185. Given the language of the statute, the Supreme Court has consistently viewed the 1934 amendments as addressing primarily the *precertification* rights and freedoms of unorganized employees. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 109 S. Ct. 1225, 1234 (1989). These amendments made more explicit the employees' freedom to organize and to make a choice regarding their representatives without the coercive interference and pressure of a company union. *Id.* (*citing Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 543, 57 S. Ct. 592, 597 (1937); *Texas & N. O. R. Co. v. Railway Clerks*, 281 U.S. 548, 50 S. Ct. 427 (1930)). " 'The 1934 Act was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives.' " *Trans World Airlines*, 109 S. Ct. at 1234 (*quoting Switchmen's Union of North America v. National Mediation Bd.*, 320 U.S. 297, 317, 64 S. Ct. 95, 97 (1943) (Reed, J., dissenting)); see also *id.* at 302, 64 S. Ct. at 97 (opinion of the Court); *International Assoc. of Machinists v. Street*, 367 U.S. 740, 759, 81 S. Ct. 1784, 1795 (1961)).

The reason for this focus on precertification is that the RLA provides an exhaustively detailed procedural

framework to facilitate the voluntary settlement of major disputes. *Trans World Airlines*, 109 S. Ct. at 1234 (*citing Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, 98 S. Ct. 1109, 1115 (1969)). The effectiveness of these private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer and on the subsequent assurance that neither party will be able to enlist the courts to further its own partisan ends. *Trans World Airlines*, 109 S. Ct. at 1234. Because of this, judicial intervention in RLA procedures is limited to those cases where but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress wrote into the RLA. *Switchmen's*, 320 U.S. at 300, 64 S. Ct. at 96.

In post-certification cases such as this one, jurisdiction under Section 2, Fourth is limited to actions by an employer that constitute "a fundamental blow to union or employer activity and the collective bargaining process itself." *Trans World Airlines*, 109 S. Ct. at 1235. Such conduct must be "inherently destructive of union or employer activity." *Id.*; *National R.R. Passenger Corp.*, 915 F.2d at 51 (judicial intervention permitted if the employer engaged in a fundamental attack on the collective bargaining process or a direct attempt to destroy the union); *International Assoc. of Machinists & Aerospace Workers v. Alaska Airlines, Inc.*, 813 F.2d 1038, 1040 (9th Cir.), *cert. denied*, 484 U.S. 926, 108 S. Ct. 290 (1987) (same).

The plaintiffs' argument then must be that Supplement B is a fundamental blow to the collective bargaining process and is inherently destructive to union activity. Before addressing this argument, the Court must set out

specifically what Supplement B encompasses and does not encompass. Supplement B gives job security to pilots hired before November 1, 1983. Supplement B also guarantees to pilots hired before November 1, 1983 that their salaries will never dip below 1983 levels and that their pension plans cannot be reduced below 1983 levels. In other words, the agreement provides a floor for certain benefits to a discreet group of workers.

Supplement B places no bar on the APA negotiating the same guarantees for pilots hired after 1983. In fact, Supplement B expressly gives the APA the right to negotiate the same benefits for such pilots. "Nothing contained herein shall be deemed to restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the pilots . . . hired on or after November 1, 1983, provided, however, that neither party will attempt to totally eliminate the existing differentials." In other words, as the Magistrate Judge found, the APA can bargain for a salary guarantee on behalf of the post-1983 pilots at the 1983 level as long as a one penny difference remains between the pre-1983 and post-1983 pilots. The same conclusion applies to pension benefits.

Such a contract provision is hardly the type of "fundamental blow" to the bargaining process that the Supreme Court had in mind in *Trans World Airlines*, nor does it match the feudalistic slave imagery that Supplement B conjures up in the mind of the plaintiffs' attorney. (*See* Plaintiffs Objections at 6, 14, 15, 19, and 21). Supplement B does not, as plaintiffs contend, result in a thirty year waiver of guaranteed pay levels or pension benefits for post-1983 pilots. The agreement specifically provides

for negotiations on such issues. Indeed, these negotiations have been taking place over the last eight years and the differentials have been narrowed if not effectively erased. These issues are in no way waived by Supplement B.

Plaintiffs' other argument is that Supplement B gives pre-1983 pilots veto power and therefore requires tripartite bargaining as to pay and pension benefits. Supplement B does no such thing. Current contracts, like all past contracts, are approved by a majority of the APA members. If any group has veto power over a contract with American it is the post-1983 pilots who currently comprise 59% of the Union members. This majority allows the post-1983 pilots to bargain and vote for any pay or benefit level or guarantee up to a one penny differential with the pre-1983 pilots' benefits level. The pre-1983 pilots have no veto power whatsoever.

It is important to view Supplement B in the context of the history of the original negotiations in 1983. The pre-1983 pilots were faced with a difficult choice when they agreed to Supplement B. To stay competitive, American needed significant wage concessions from the APA. The choice was between deep cuts in pay and benefits, or a salary freeze, with job guarantees and a slight reduction in benefits. Of course, along with the second option went a reduction in pay and benefits for future pilots. In choosing the two-tier option, the pre-1983 pilots obviously acted out of self-interest. But the pre-1983 pilots had something that the post-1983 pilots never would have: an expectation in a certain level of income and benefits earned during their employment with American. *See Seaboard World Airlines*, 443 F.2d at 439 (union performed

rather than violated duty of fair representation when it negotiated job security for airplane navigators with 13 years experience or more; new hires had no expectation in a permanent job); *see e.g. Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 916 (7th Cir. 1974) (union agreement permitting employer to discharge probationary pilot without a hearing is not hostile discrimination against a group of employees outside the proper scope of a collective bargaining agreement). In addition, the pre-1983 pilots were part of the work force that had built the airline into a major force in the airline industry and could legitimately expect some reward for their efforts. Those pilots hired after Supplement B went into effect joined American with their eyes opened regarding pay scale and pension guarantees. Thus, the APA made a difficult choice in choosing the two-tier option, but in doing so left the door open for all but doing away with that option as it related to post-1983 pilots at a later date.

Plaintiffs cite a number of early National Labor Relations Board cases to support their argument. *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940); *NLRB v. Reed & Prince Mfg., Co.*, 118 F.2d 874, 883 (1st Cir. 1941); *Vanderbilt Products, Inc.*, 297 F.2d 833 (2nd Cir. 1961) (*per curiam*), *enf'g* 129 N.L.R.B. 1323. According to plaintiffs, *National Licorice* and *Reed & Prince* prohibit "any long-term contract covering an issue like the union shop, since that was an issue important to the union as an institution." (Plaintiffs' Objections at 12). These cases are distinguishable. First, this case does not involve a permanent waiver of a fundamental topic of collective bargaining. Supplement B is "long-term" only to the extent that the APA, with its post-1983 pilot majority, is unwilling to

bargain for 1983-level salary and pension guarantees for post-1983 pilots.

Second, both *National Licorice* and *Reed & Prince* involve employers who refused to bargain with the collective bargaining representative of their respective employees. *See also Vanderbilt*, 297 F.2d at 834 (insistence on completely open shop with no union membership in union contract was a "stalling tactic by a party bent upon maintaining the pretense of bargaining"). In *National Licorice*, the employer circumvented the union and coerced its employees into signing a contract that relinquished the individuals' right to contract with the employer through a union. This provision placed "illegal restraints on the employees' rights to organize and bargain collectively" in plain conflict with public policy. 309 U.S. at 360. In *Reed & Prince*, the employer insisted on a clause that would permanently waive the union's right to seek a closed shop before signing a contract. By insisting on such a provision, the NLRB was warranted in concluding that the employer was not bargaining in good faith. 118 F.2d at 883. The instant case does not involve an employer who is unwilling to bargain, in fact the course of union negotiations over the past eight years reveals that all topics have been on the bargaining table. For example, the two-tier salary scale, which is not at issue in this case, has been modified into a single, seniority based pay scale.

As a matter of personnel policy, one can argue about the wisdom of two-tier benefit programs. The plaintiffs' expert, Professor Clyde Summers, does just that in his affidavit, which the Court has carefully read. The problem the Court observes with Professor Summers' opinion

is that it is based on the same flawed reading of Supplement B on which the plaintiffs rely. As the Court has already explained, Supplement B does not waive negotiations on any issue, nor does it give the pre-1983 pilots veto power.

Amazingly, plaintiffs assert in their brief that *"[s]ignificantly, no one claims in this case that Supplement B serves any legitimate employer need or purpose!"* (Plaintiff's Objection at 5) (emphasis in original). This statement may be the result of historical and economic amnesia. In 1983, American's projected growth was stagnant. American had hired few pilots in the past few years, and it owned an aging fleet of airplanes. In the aftermath of deregulation and Supplement B, American has been catapulted into one of only three large surviving airlines. American has bought numerous new airplanes and hired over 5,000 pilots – post-1983 pilots – to fly them. Indeed, it is not farfetched to state that without these concessions there would be no post-1983 pilots, let alone an American Airlines. The 1983 concessions by the APA are in large part responsible for these developments, and they are not illegal under any reading of the RLA. Perhaps the only recourse left to plaintiffs is with Congress and an amendment of the RLA.

B. Antitrust

Plaintiffs object to the Magistrate Judge's conclusion that both the statutory and nonstatutory labor exemptions to the antitrust laws require dismissal of this claim. According to the plaintiffs, they have "alleged that Supplement B is an anti-trust violation affecting the labor

market: it is a 30-year, indenture-type agreement imposed on third parties (the B-scale pilots) who have no right to 're-bargain' the deal *for thirty years!*" (plaintiff's Objection at 22) (emphasis in original). Plaintiffs concede that if Supplement B is legal under the RLA, then there can be no antitrust violation. (Plaintiffs' Objection at 23). The Court agrees with the Magistrate Judge that the agreement is legal and therefore cannot form the basis for an antitrust violation.

## V. CONCLUSION

With the clarifications made above, the Court adopts the Report and Recommendation of Magistrate Judge Bucklo. Accordingly, the Court denies the plaintiffs' motion for summary judgment and motion to strike. The Court grants the defendant's motion to dismiss and motion for summary judgment.

ENTER:

/s/ Ilana D. Rovner
ILANA DIAMOND ROVNER
UNITED STATES DISTRICT COURT

DATED: December 26, 1991

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Renneisen

v.

American Airlines

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90 C 5930

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. ~~This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.~~

IT IS ORDERED AND ADJUDGED with the clarifications made in its Memorandum, the Court adopts the Report and Recommendation of Magistrate Judge Bucklo. Accordingly, the Court denies the plaintiffs' motion for summary judgment and motion to strike. The Court grants the defendant's motion to dismiss and motion for summary judgment.

December 26, 1991
*Date*

H. STUART CUNNINGHAM
*Clerk*

/s/ Terry Charles
Terry Charles
*(By) Deputy Clerk*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| **PAUL F. RENNEISEN, THOMAS FRANK LETO, LAWRENCE M. KAMPA JR., ARPAD E. HORVATH, KARL BORK, CARL W. BATTIS, and JOHN H.N. WHATLEY,** individually and on behalf of all similarly situated persons, | ) | Case No. 90 C 5930 |
| Plaintiffs, | ) | |
| v. | ) | |
| AMERICAN AIRLINES, INC., a corporation, | ) | |
| Defendant. | ) | |

REPORT AND RECOMMENDATION

Paul F. Renneisen, Thomas Frank Leto, Lawrence M. Kampa Jr., Arpad E. Horvath, Karl Bork, Carl W. Battis and John H.N. Whatley,[1] pilots employed by American Airlines, Inc. ("American") brought suit against American alleging that a two-tiered wage and benefit scale put in place in 1983 ("Supplement B") which divided the compensation levels between pilots already employed by American (A-scale pilots) from those hired after Supplement B became effective (B-scale pilots) violates certain

[1] The complaint names these individuals as class representatives of all the pilots hired after the promulgation of Supplement B. However, a ruling on class certification has been stayed pending the outcome of these motions.

provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1, *et seq.* and Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. American answered the complaint and asserted a variety of affirmative defenses which plaintiffs moved to strike. Subsequently, both parties moved for summary judgment. American also moved to dismiss the complaint. Those motions have been referred to me. I recommend that plaintiffs' motions to strike and for summary judgment be denied and American's motion for summary judgment and motion to dismiss be granted.

## FACTS[2]

Since 1963, American pilots have been represented by the Allied Pilots Association ("Association") which has

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[2] The facts set forth here are taken from American's Local Rule 12M Statement filed in support of its summary judgment motion because plaintiffs failed to file a 12N Statement in response, thereby admitting all of the statements in American's 12M Statement. U.S.Dist.Ct. Gen.R. 12M and 12N; *Saribekian v. Concrete Drilling & Sawing Co.*, No. 89 C 7902, 1990 U.S. Dist. LEXIS 11997 (N.D. Ill. 1990). In addition, plaintiffs' Local Rule 12M Statement failed to comport with the requirements of that rule. On April 19, 1991, plaintiffs attempted to remedy their deficiency in a supplemental memorandum and affidavit. At the time I denied permission to file the supplemental materials on the ground that this opinion was substantially completed. Other matters intervened, however, and this opinion was not finished. Accordingly, I have considered the memorandum and affidavit. Nevertheless, the outcome is the same. The facts relied upon herein have not been contradicted. Most of the additional facts set forth in the April 19 supplement concern matters that are barred by the statute of limitations, as hereafter discussed.

negotiated successive bargaining agreements with American since that time. In 1983, American and the Association negotiated an agreement which included Supplement B. This agreement was made against the back drop of the 1978 deregulation of the airline industry which created an influx of low-cost air carriers who competed with American in the marketplace, ultimately reducing American's operating revenues. In addition, fuel prices increased creating more problems for American because its aircraft were older models and not fuel efficient.

By the time of the 1983 agreement, American projected a one percent annual growth rate through 1988, resulting in little anticipated need for new pilots. American decided it could only guarantee future growth by decreasing its labor costs, permitting it to upgrade its fleet and compete with its low-cost competitors. During negotiations with American which gave rise to Supplement B, the Association preferred a two-tier wage scale over wage concessions because the two-tier system recognized the present pilots' efforts in building American and it allowed American to offer future pilots competitive wages. However, Supplement B established differentials in wages, pension and vacation benefits between the B-scale and the A-scale pilots.

Supplement B provides that it may only be eliminated by agreement between the Association, American and a majority of the A-scale pilots, but the Association may bargain for increased pay and benefits for the B-scale pilots so long as the differentials are not totally eliminated. Indeed, the differentials have been reduced as

a result of negotiations in 1985, 1986 and 1987. In addition, after the tenth year of service (ninth year for captains), the A-scale and B-scale pay rates merge.

American's Motion To Dismiss
Or For Summary Judgment

Count I

Plaintiffs allege that Supplement B is an illegal Waiver of their right to bargain in violation of Section 2, First, Fourth and Ninth of RLA, 45 U.S.C. § 152. American contends that plaintiffs' Section 2, Fourth claims fail to state a claim for relief.[3]

The RLA, passed in 1926 and extended to encompass airlines ten years later, was a legislative attempt "to stabilize industrial relations patterns and extend the periods during which parties themselves could work out a peaceful solution to their disputes," to avoid disruptions in railway service (which served as the basic transportation throughout the country at that time) and to avoid the dire effects such disruptions had on the national economy. 9 T. Kheel, *Labor Law*, § 50.02 (1990). To achieve its goal, the RLA provides a detailed framework of dispute resolution, most of which occurs in various non-judicial forums. *E.g.*,

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[3] American argues that plaintiffs lack standing to sue for alleged violations of Section 2, First and Ninth, 45 U.S.C. § 152. In view of the fact that American agrees that plaintiffs have standing to assert a violation of Section 2, Fourth and the fact that I conclude plaintiffs state a claim for relief under this section, and plaintiffs do not allege that Section 2, First and Ninth provide any rights that go beyond the claim recognized in Section 2, Fourth, at least in the present context, I have not considered the standing issue.

45 U.S.C. §§ 153, 154, 155.[4] Federal courts have nevertheless held that they have jurisdiction over a statutory violation of the RLA. *Air Lines Pilots Assoc. Int'l. v. UAL Corp., Int'l Assoc. of Machinists & Aerospace Workers*, 874 F.2d 439, 444 (7th Cir. 1989); *Railway Labor Executives' Assoc. v. Boston & Maine Corp.*, 808 F.2d 150, 158 (1st Cir. 1986), *cert. denied*, 484 U.S. 830 (1987).

Section 2, Fourth, 45 U.S.C. § 152, Fourth, generally gives employees the right to organize and bargain collectively through their authorized representative without any interference or coercion by the employer. The Supreme Court has stated that the general purpose of Section 2, Fourth (and all of the 1934 amendments) is to address "precertification rights and freedoms of unorganized employees." *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 109 S.Ct. 1225, 1234 (1989). Accordingly, judicial intervention is limited in post-certification controversies under Section 2, Fourth to cases in which

> 'the employer's conduct "has been motivated by anti-union animus . . . or an attempt to interfere with its employees' choice of their collective bargaining representative" . . . or constitutes "discrimination or coercion" against the representative . . . or involves "acts of intimidation [which] cannot be remedied by administrative means," . . . '

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[4] The judiciary has formulated names for the different types of disputes under the RLA (major and minor) which have different dispute resolution processes and for which a federal court may or may not have jurisdiction. *See, e.g., Airline Pilots Assoc. Int'l. v. UAL Corp.*, 874 F.2d 439, 443-44 (7th Cir. 1989).

*National Railroad Passenger Corp. v. Int'l. Assoc. of Machinists & Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990) (citations omitted), quoting from *Independent Union of Flight Attendants v. Pan American World Airways*, 789 F.2d 139, 142 (2d Cir. 1986), and cases quoted within. Judicial intervention is also permitted where an employer wages "a fundamental attack on the bargaining process" or attempts to directly destroy the union. *Id.*

Here, plaintiffs contend that Supplement B destroys the collective bargaining process because the two-tier wage scale may never be overcome. As a result, say plaintiffs, the B-scale pilots will always feel inferior to the A-scale pilots, forcing the Association to represent two distinct groups with two distinct agendas, crippling the Association's ability to bargain effectively and violating Section 2, Fourth. These allegations are sufficient to state a claim for violation of Section 2, Fourth.

American alleges that plaintiffs' claim is barred by the six-month statute of limitations applicable to actions for violation of Section 152 of the RLA. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Railway Co.*, 768 F.2d 914 (7th Cir. 1985). Since Supplement B was signed in 1983, the six-month period has long passed. However, plaintiffs argue that Supplement B is invalid on its face. In such cases, courts have held that the six-month statute of limitations does not apply. *E.g., Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 423 (1960); *N.L.R.B. v. Local 1131*, 777 F.2d 1131, 1140 (6th Cir. 1985).

Plaintiffs' argument of facial invalidity is that under Supplement B, one group of pilots, the A-scale pilots, are forever protected from the possibility of having their jobs,

pay and benefits eliminated or reduced below what was in effect on November 1, 1983, in the course of collective bargaining. Plaintiffs argue that even if there no longer exists any wage differential, the guarantee which B-scale pilots do not have – is illegal[5] because the "inevitable consequence . . . is internal union disharmony." Plaintiffs' Memorandum In Support Of Their Statement Of Issues Not In Dispute, at 7. There is, however, nothing in Supplement B that makes such disharmony "inevitable." As plaintiffs concede, they could bargain to have all pilots have the same guarantees. They do not argue that a collective bargaining agreement that achieved a 30-year guarantee of jobs and benefits for all pilots hired by American would be illegal. The only requirement in Supplement B affecting future negotiations about B-scale pilot benefits is that differentials not be totally eliminated. (Supplement B, Part C). Thus, Supplement B, a one penny differential must remain between some pay or benefit given to the A-scale pilots and B-scale pilots for the life of the agreement, which plaintiffs claim could be as long as 30 years.[6]

Plaintiffs have cited no case, and I have found none, that holds that a thirty-year waiver on the right to bargain over a one cent pay differential, or any comparable

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[5] There is some dispute as to whether pay and benefit differentials continue to exist, but plaintiffs do not (and could not) argue that the fact that a collective bargaining agreement creates pay differences among different groups makes it illegal.

[6] It expires with the retirement or death of the last A-scale pilot or by the agreement of a majority of active A-scale pilots, the Association and American.

minutiae,[7] amounts to a "fundamental attack on the bargaining process" or a direct attempt to destroy the union. *National Railroad Passenger Corp., supra,* 915 F.2d at 51. Furthermore, even if the possibility of a one cent differential is cognizable by the courts, the fact that one group has permanent protection for its position does not make the agreement illegal. *E.g., Seaboard World Airlines, Inc. v. Transport Worker Union of America,* 443 F.2d 437 (2d Cir. 1971). Indeed, in *Seaboard,* an agreement proving permanent security for some workers was upheld although it prohibited bargaining to achieve the same security for other workers. Here, there is no prohibition on the B-scale plots (who now constitute a majority of the pilots) bargaining for any benefit they want.

Plaintiffs argue that even if all that is prohibited by Supplement B is elimination of a one cent pay differential, in fact the differential has in the past been, and perhaps in the future may be, much greater. But here plaintiffs run into the statute of limitations problem they attempted to avoid by arguing facial invalidity. The fact that they may be affected by a contract provision agreed to at some time in the past does not avoid the statute of limitations. *E.g., IAM v. Aloha Airlines,* 790 F.2d 727, 737 (9th Cir. 1986).

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[7] Oddly, plaintiffs agree that courts should not "review the reasonableness of the substantive terms (the 'minutiae') of the collective bargaining agreement." Plaintiffs' Reply Memorandum In Support Of Motion To Strike, at 7. *See, e.g., Railway Labor Exec. Ass'n v. Boston & Maine Corp.,* 664 F.Supp. 605, 616 (D. Me. 1987) and cases cited therein.

Plaintiffs also argue that they have alleged a continuing violation in that American continues to refuse to bargain over the issues covered by Supplement B. In fact, however, their complaint alleges no refusal to bargain later than the 1987 contract negotiations, well beyond the six-month statue [sic] of limitations. From the various pleadings filed on these motions, however, it appears that negotiations over a new contract have been going on for some time, and that a new contract was signed in February, 1991, with some issues remaining for arbitration. An examination of plaintiffs' allegations with regard to these negotiations, however, shows that plaintiffs do not claim that American has refused to bargain over wages, benefits or any other working conditions. Their claim is simply that American refuses to negotiate the elimination of Supplement B (with its minimal one penny differential requirement) itself. However, since I have concluded that the only requirement left standing in Supplement B at this date, the one penny differential, is insignificant and not illegal on its face, plaintiffs cannot use the refusal to bargain over this trifle as a pretext for reopening the statute of limitations as to the effect of Supplement B. *See, e.g., Local Lodge No. 1424 v. N.L.R.B., supra,* 362 U.S. at 416-17; *N.L.R.B. v. Local 1131, supra,* 777 F.2d at 1139-40 (6th Cir. 1985).[8]

## Count II

Plaintiffs seek damages under various provisions of the anti-trust laws contending that Supplement B illegally

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[8] Plaintiffs refer to disparities between American pilots and pilots working for other airlines. Any such disparities cannot form a basis for this action.

restrains competition in the labor market by foreclosing the B-scale pilots' rights to bargain away the differentials causing them to be paid below market wages.

Both the statutory and nonstatutory labor exemptions to the antitrust laws require dismissal of this claim. As plaintiffs themselves acknowledge in their complaint, ¶ 37, a collective bargaining agreement fixing wages and benefit levels is immune from attack under the antitrust laws. *E.g., United Mines Workers v. Pennington*, 381 U.S. 657 (1965); *Mid-America Regional Bargaining Assn. v. Will County Carpenters District Council*, 675 F.2d 881 (7th Cir. 1982). Plaintiffs attempt to avoid this result by claiming that Supplement B concerns an "illegal subject, *i.e.*, the waiver of the statutory right to bargain about wages and pension benefits at reasonable future intervals." Complaint, ¶ 38. I have found, however, that Supplement B is not illegal and does not waive any such right to bargain (other than over a single penny). Accordingly, both statutory and nonstatutory labor exemptions are applicable. *E.g., Mid-America Regional Bargaining Assn. v. Will County Carpenters District Council, supra.*[9]

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[9] Plaintiffs also argue that since they were not there when Supplement B was negotiated, the statutory exemption is inapplicable. This argument has been rejected by the courts. *E.g., Zimmerman v. National Football League*, 632 F.Supp. 398, 405 (D. D.C.) ("not only present but potential future players for a professional sports league are parties to the bargaining relationship").

## Count III

Plaintiffs claim that Supplement B violates Section 501 of ERISA (29 U.S.C. § 1140) because it limits their rights to pension benefits and discriminates against them because it precludes their right to bargain for benefits equal to or in excess of those of the A-scale pilots.

Section 510 provides in part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . .

29 U.S.C. § 1140. Thus, Section 510 protects the employment relationship giving rise to the individual's pension rights. Deeming v. American Standard, Inc., 905 F.2d 1124, 1127 (7th Cir. 1990).

> This means that a fundamental prerequisite to a § 510 action is an allegation that the employer-employee relationship . . . was changed in some discriminatory or wrongful way.

*Id.* Courts have generally found that an employer engages in discriminatory conduct under Section 510 when that conduct amounts to a constructive discharge. *Paul v. Valley Truck Parts, Inc.*, No. 88 C 7131, 1990 U.S. Dist. LEXIS 4554 (N.D. Ill. 1990); *Young v. Standard Oil (Indiana)*, 660 F.Supp. 587, 597 (S.D. Ind. 1987), *aff'd*, 849 F.2d 1039 (7th Cir. 1988); *cert. denied*, 488 U.S. 981 (1988).

Here, plaintiffs offer nothing which would show that they have been constructively discharged. Plaintiffs claim they are being discriminated against because Supplement B limits their ability to negotiate any increase in their

pension benefits. The evidence demonstrates this is not correct but at any rate, the right to negotiate the amount of the benefit is not what Section 510 seeks to protect. *Deeming v. American Standard, Inc., supra,* 905 F.2d at 1127 (Section 510 protects employment relationship against employer's interference with or discrimination against attainment of a pension right). Plaintiffs do not allege nor is there any evidence to suggest that American has denied them or any B-scale pilot the right to receive pension benefits.

Plaintiffs also contend that the differentials between the two scales are discriminatory and therefore violate Section 510. However, Section 510 provides no remedy for a discrimination injury absent some employment injury. *Gladich v. Navistar Int'l Transp. Corp.,* 703 F.Supp. 1331, 1333 (N.D. Ill. 1989).

Accordingly, plaintiffs fail to state any claim under Section 510 of ERISA.

## Conclusion

I recommend that American's motion for summary judgment and motion to dismiss be granted and that plaintiffs' motion for summary judgment be denied.

/s/ Elaine E. Bucklo
**ELAINE E. BUCKLO**
United States Magistrate Judge

**Dated:** June 3, 1991

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Judge Ilana Diamond Rovner within ten (10) days after service of this Report and Recommendation. See Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

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**United States Court of Appeals**

For the Seventh Circuit

Chicago, Illinois 60604

April 22, 1993.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

| | | |
|---|---|---|
| PAUL RENNEISEN, et al., Plaintiffs-Appellants, | ) | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| **No.** 92 1213 vs. | ) | |
| AMERICAN AIRLINES, INC., Defendant-Appellee. | ) | No. 90 C 5930 |
| | ) | Ilana D. Rovner, *Judge.* |

ORDER

The plaintiffs' petition for rehearing and motion to correct opinion are hereby denied.

CERTIFIED COPY

**United States Court of Appeals**
For the Seventh Circuit
Chicago, Illinois 60604

**JUDGMENT – WITH ORAL ARGUMENT**

**Date: March 24, 1993**

**BEFORE:** **Honorable** WALTER J. CUMMINGS, Circuit Judge

**Honorable** DANIEL A. MANION, Circuit Judge

**Honorable** HARLINGTON WOOD, Jr., Senior Circuit Judge

No. 92-1213

PAUL F. RENNEISEN, THOMAS F. LETO, LAWRENCE M. KAMPA, JR., et al.,
Plaintiffs – Appellants

v.

AMERICAN AIRLINES, INCORPORATED, a corporation,
Defendant – Appellee

(Filed Apr. 30, 1993)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 90 C 5930, Ilana D. Rovner, Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, with costs, subject to the minor

modifications, in accordance with the decision of this court entered this date.

(1061-030690)

A True Copy
Teste:
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Clerk of the United States
Court of Appeals for the
Seventh Circuit

ADDENDUM 1

**SUPPLEMENT B**
**AGREEMENT**
**between**
**AMERICAN AIRLINES, INC.**
**and**
**THE AIR LINE PILOTS**
**in the service of**
**AMERIAN AIRLINES, INC.**
**as represented by**
**ALLIED PILOTS ASSOCIATION**

**THIS AGREEMENT** is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between AMERICAN AIRLINES, INC., hereinafter known as the "Company" and the AIR LINE PILOTS in the service of AMERICAN AIRLINES, INC., as represented by the ALLIED PILOTS ASSOCIATION, hereinafter known as the "Association".

**WHEREAS**, the Company and the Association recognize the problems that have arisen as a result of deregulation of the airline industry; and

**WHEREAS**, the parties recognize that innovative approaches must be used in order to assure employees and management that the Company shall remain competitive in a changed economic environment; and

**WHEREAS**, the Company and the Association acknowledge the contributions that each has made over the past years to the status of the Company as a leading air carrier; and

**WHEREAS**, the current pilot group through the Association has made significant concessions with respect

to its established contract rights which are designed to permit the Company to compete effectively over the indefinite future;

**NOW, THEREFORE**, the parties hereby agree to the following terms, provided the provisions of the Basic Agreement shall apply except as modified herein, and in the event of a conflict, the provisions herein shall apply:

## A. JOB SECURITY

1. General

The Company will guarantee employment and grant system job security forever as a pilot to all pilots covered by the Basic Agreement who were on the Company's active flight payroll on November 1, 1983, or on an Association Leave of Absence on that date, or on an approved leave of absence on that date, provided that such pilot on such leave of absence has a pilot seniority date more senior that the least senior pilot with job security upon his return to the active flight payroll.

2. Category Protection

a. In each contractual month the Company will guarantee at each base, a number of captain and copilot positions [regular, reserve, relief, supernumerary, designations and temporary assignments 24.D.1. (full month)]. This number will be equal to the number of captain and copilot positions for the contractual months of November and December 1983, or as established in the 1983 Flex Protection Floor, whichever is greater.

b. 1. Effective January 1, 1984, ___ captain pay positions and ___ copilot pay positions will be guaranteed throughout the system to the extent of the number of pilots covered by paragraph 6. below.

2. In each calendar year that such category pay protection is in effect, a recalculation will be made at the end of the contractual months of June and December. Such recalculation shall be made by dividing the number of captain and copilot positions at each base [regular, reserve, relief, supernumerary, designations and temporary assignments 24.D.1. (full month)] by the total number of such positions [regular, relief, supernumary [sic], designations and temporary assignments 24.D.1. (full month)] in the system to establish a ratio by base. Such ratio shall be applied to the January 1, 1984 guaranteed number in 2.a. above to determine the number of company obligations at each base for the six (6) subsequent contractual months.

c. In the event of a base closing, the obligated positions of the closed base will be distributed among the remaining bases.

d. In the event of a base opening, the obligated positions for such newly opened base, as well as the adjustment of the obligated positions of the remaining bases will be determined in accordance with 2.b. above.

e. When the number of positions awarded at a base in a contractual month is less than the obligated number in category, then the pilot or pilots who selected all trip selections, including reserve, in the next higher category, but were not awarded a trip selection(s) in such category

will receive the reserve guarantee for the lowest equipment in the category involved. The number of pilots eligible for such compensation will be the difference between the positions awarded and the obligated number. The pilot must be previously or currently qualified in the category to be eligible for pay protection.

f. Such category protection will be afforded only to pilots active on the payroll on November 1, 1983.

3. Job Security For Pilots Hired Prior To November 1, 1983 And On Furlough Status On That Date

Pilots on flight furlough status from the Company on November 1, 1983 who retain recall rights and who are subsequently recalled and reemployed as a pilot for the Company shall receive the same job security and guarantee of employment as afforded pilots in A.1. above, provided however, such job security and guarantee of employment shall be provided only in order of seniority on a one-for-one basis as pilots under A.1. above and as flight engineers permanently leave the employ of the Company. The number of pilots extended job security and guarantee of employment under this provisions shall not exceed the number of individuals on flight furlough status on November 1, 1983.

4. Exceptions To Job Security

Notwithstanding the above provisions, the Company may furlough in accordance with Section 25 of the Basic Agreement any pilot with job security as provided herein when that furlough is necessitated by any one or more of the following conditions:

a. An act of God,

b. A strike by any Company employee group,

c. A national emergency,

d. Involuntary revocation of the Company's operating certificate or certificates,

e. A reduction in the Company's operation resulting from a decrease in available fuel supply caused by either governmental action or by commercial suppliers being unable to meet the Company's demands.

This Agreement does not in any way limit the Company's right to discharge or discipline a pilot for just cause or disqualify a pilot due to medical reasons as defined in the Basic Agreement effective this date.

## B. PAY AND RETIREMENT BENEFIT PROGRAMS FOR PILOTS HIRED PRIOR TO NOVEMBER 1, 1983

1. The Company agrees that it will take no action, at any time, by way of notice, negotiations or otherwise, to diminish the pay or the retirement benefit programs in effect on the date hereof for pilots hired prior to November 1, 1983, and that such pilots shall enjoy such pay and pension benefits for so long as they are qualified under applicable governmental regulations and the provisions of the Collective Bargaining Agreement to perform flying duties, on an approved leave of absence, or disability retirement, and this agreement shall remain in effect for such period of time.

2. This Agreement as provided herein shall remain in effect so long as any pilot with job security remains in

the active employ of the Company as a flight crew member or retains recall rights. The parties hereto, as well as the persons bound hereby, irrevocably waive the right to serve any Section 6 notice, under the Railway Labor Act, of an intended change which, if adopted, would have the effect of modifying any of the provisions contained in this Agreement or otherwise to require bargaining as to such provisions, provided, however, that this Agreement may be changed by unanimous agreement between the parties and a majority of the pilots with job security and guarantee of employment as provided herein.

3. Neither the Company nor the Allied Pilots Association, their successors, assigns or affiliates, shall challenge, contest, or question the legality, validity, or enforceability of this Agreement, or any provisions thereof, in any judicial, administrative, or other proceeding, and each of the parties shall participate in defending the legality, validity, and enforceability of this Agreement in any judicial, administrative, or other proceeding involving any of its provisions.

C. Nothing contained herein shall be deemed to restrict either party from negotiating a change in the differentials between the respective pay or the retirement benefit programs of the pilots in the employ of the Company prior to November 1, 1983 and those hired on or after November 1, 1983, provided, however, that neither party will attempt to totally eliminate the existing differentials.

**IN WITNESS WHEREOF**, the parties hereto have signed this Agreement this the 4th day of November, 1983.

**WITNESS:**
**/s/ illegible**
**/s/ illegible**
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**FOR AMERICAN AIRLINES, INC.**
/s/ C. A. Pasciuto
C. A. Pasciuto
Vice President
Employee Relations

/s/ D. E. Ehmann
Vice President-Flight

**FOR THE AIR LINE PILOTS IN THE SERVICE OF AMERICAN AIRLINES, INC. AS REPRESENTED BY THE ALLIED PILOTS ASSOCIATION**

/s/ R. H. Malone
R. H. Malone
President

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| PAUL F. RENNEISEN, THOMAS FRANK LETO, et al., | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 90 C 5930 |
| AMERICAN AIRLINES, INC., a corporation, | ) | |
| Defendant. | ) | |

AFFIDAVIT OF CLYDE W. SUMMERS

| | | |
|---|---|---|
| CITY OF PHILADELPHIA | ) | |
| | ) | SS: |
| COMMONWEALTH OF PENNSYLVANIA | ) | |

I, Clyde W. Summers, being duly sworn voluntarily deposes and states as follows:

1. My name is Clyde W. Summers. I am Professor of Law at the University of Pennsylvania. I have been in the position since September, 1975.

## I QUALIFICATIONS

2. I have been studying and teaching labor law and labor relations for more than forty-five years. I received a Doctor of Laws degree from the University of Illinois in 1942. I later did graduate work in law at Columbia University, specializing in labor law, and particularly in the rights of union members in the internal processes of

unions. I received degrees of Master of Laws and Doctor of the Science of Laws from Columbia.

I have taught, among other subjects, a wide range of courses and seminars on labor law, collective bargaining, arbitration, internal union government, individual employment rights and union democracy at the University of Toledo for six years, at the University of Buffalo for six years, at Yale University for nineteen years, and at the University of Pennsylvania for fifteen years. During these years, my primary scholarly and research work has been in labor law and labor relations. Within that field my major research and writing has been on the internal political processes of unions and union government, and the democratic rights of union members.

3. I have published seven books and more than one hundred law review articles, monographs, symposia contributions, and other pieces on various aspects of labor law. At least a third has been related to internal union problems, and these articles include analysis of both legal and practical aspects of union government. These include the following:

"Democracy in a One Party State: Perspectives from Landrum-Griffin" 42 Md.L.Rev. (1983)

"The Right to Join a Union", 47 Col.L.Rev. 33 (1947)

"Legal Limits on Union Discipline," 64 Harv. L. Rev. 1049 (1951)

"Judicial Regulation of Union Elections, 30 Yale L. F. 1221 (1961)

"*Democracy in Labor Unions*", American Civil Liberties Union, 1952

Another third of my writings has related to problems of collective bargaining, grievance processing and arbitration. These include the following:

"Judicial Review of Labor Arbitration", 2 Buff. L. Rev. (1952)

Individual Grievances", (Report of Committee on Improvement of Administration of Collective Agreements, Labor Law Section, ABA) 50 Nw. V. L. Rev. 143 (1955)

"Ratification of Collective Agreements", in *Frontiers of Collective Bargaining* (Ed. N. Chamberlain)

"Bargaining in the Public's Business: Principles and Politics" 18 Univ. of Tol. L. Rev. 265(1987)

"Teamster Joint Grievance Committees: Grievance Disposal without Adjudication," Ind. Rel. L. J. 313(1985)

4. In all of my research, I have always tried first to learn what the grass roots practices were and to understand the practical functioning of unions as political organizations engaged in collective bargaining. For me, the question has always been how the law responded to the realities of union and industrial life. For example, before I wrote a legal article on "The Right to Join a Union," I researched and wrote "Admission Policies of Unions," 61 Q. J. Econ. 66 (1946); and before I wrote "Legal Limits on Union Discipline," I wrote "Disciplinary Powers of Unions," 3 Ind. & Lab. Rel. Rev. 483 (1950), and "Disciplinary Procedures of Unions," 4 Ind. & Lab. Rel. Rev. 1 (1950). When I wrote the monograph "Democracy in Labor Unions," for the American Civil Liberties Union I had extensive discussions with union lawyers, union

leaders and others personally familiar with union problems.

The research for the article on "Judicial Regulation of Union Elections" involved interviewing a large number of union officers, members and lawyers representing unions. The article on "Democracy in a One Party State" was based on observance and involvement in union elections for 35 years.

5. For my teaching of labor relations and collective bargaining, I have always tried to learn and understand first hand the practical aspects of contract negotiations, grievance handling and arbitration, and particularly the decision-making processes of the union in collective bargaining. Much of this understanding has come through close personal contract [sic] with union members and officers and with employers. Under the auspices of the New York School of Industrial and Labor Relations, I taught a number of night courses on collective bargaining policies, grievance settlement, and arbitration principles and procedures for union officers and employer representatives. Also, I taught at a number of union educational conferences and seminars for union officers at Cornell. All of these were taught as open discussions in which I learned as much as I taught.

6. I have been actively engaged in labor arbitration for forty years, doing both grievance and contract arbitration in the public and private sector, and am on the panel of arbitrators for the American Arbitration Association and the Federal Mediation and Conciliation Service. Many of these cases, and particularly fact-finding cases,

involve a substantial aspect of mediation in finding a mutually agreeable solution.

I served for several years as an alternate member on the Connecticut State Labor Relations Board and the Connecticut State Mediation Board. I have served as fact-finder in hospital disputes under Section 213 of the LMRA and was on the panel of the Massachusetts Mediation Commission involving as dispute between the state and several thousand of its employees. In Pennsylvania I have served as mediator-arbitrator in resolving contract disputes in local police departments.

7. In 1957 and 1958, I served as Chairman of the New York Governor's Commission on Improper Union-Management Practices, and in 1958 was a member of Senator John Kennedy's Advisory Committee for drafting legislation which eventuated in a modified form in the Landrum-Griffin Act.

8. I have frequently been consulted by individual union members and officers concerning internal union disputes and problems. These include locals of the Auto Workers, Machinists Union, Electrical Workers, Hotel and Restaurant Employees, Service Employees, and Teamsters Union. I was consulted by the opposition group in the Mine Workers Union during its election contest, and after the opposition won in a government supervised election, I prepared draft constitutions for the national union, and several of the districts, and the model local union constitution. Those drafts were based on extensive discussions with union officers, members and union lawyers.

9. I have served as expert witness for the government in proceedings to place various unions in trusteeship under the Racketeer Influenced and Corrupt Organizations Act (RICO). These include:

United States v. Local 560, Int'l. Bhd. of Teamsters, 581 F. Supp. 279(D. N. J. 1984)

United States v. Local 30, United Slate, Tile and Composition Roofers Assn., 686 F. Supp. 1139 (E.D.Pa.1988)

United States v. Int'l. Bhd. Teamsters, 88 Civ. 4486(S.D. N.Y. 1988)

I am now acting as consultant to the government and potential expert witness in RICO cases involving New York and New Jersey locals of the Longshoreman's Union and Local 54 of the Hotel and Restaurant Employees Union.

I have also served as an expert witness for unions and for union members in a number of cases involving internal union disputes and claims that the union has violated its duty of fair representation. These include the following:"

Steelworkers v. Sadlowski, 457 U.S. 208(1982)

Young v. U.S. Postal Service, 86 Civ. 9492 (S.D.N.Y. 1989)

Baskin v. Hanley, Civil Action No. B-80-429(D. Conn. 1989)

Wood v. General Teamsters Union, Local 406, 603 F. Supp. 992(D. Mich.1985)

U.S. v. Local 20, Int'l. Bhd. of Teamsters, 671 F. 2d 645(6th Cir. 1980)

Buchholtz v. Swift & Co., 608 F.2d 317(8th Cir. 1979)

## II DOCUMENTS STUDIED

11. I have studied the various documents in the above entitled case of *Renneisen el al. v. American Airlines, Inc.*, including the following, with attached exhibits:

Complaint

Defendant's Statement of Material Facts As to Which There Is No Genuine Issue

Defendants Response to Plaintiff's Statement of Facts

Declaration of Philip A Scythe

Declaration of Wlliamon [sic] A. Jessimain

Plaintiff's Motion for Summary Judgment

Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment

Defendant's Memorandum of Law in Opposition of Plaintiff's Motion for Summary Judgment

Defendant's Motion for Summary Judgment

Memorandum in Support of Defendants Motion for Summary Judgement [sic]

Plaintiffs Reply Memorandum in Support of Motion for Summary Judgment

## III OPINION

12. After considering the above documents, it is my opinion, based on my knowledge and experience concerning the internal political processes of unions and the

negotiation processes of collective bargaining that Supplement B, negotiated in 1983, is destructive of the democratic processes of the union, denies the union the ability to act as the statutory representative of all its members, seriously obstructs the process of collective bargaining and increases the likelihood that the parties will fail to reach agreement.

13. Supplement B is an unprecedented two-tier arrangement, which, to my knowledge, has no parallel in American industry. Its effect is to divide the union membership into two categories for as long as any A-scale pilots are employed, which may be for 25 or 30 years. This division, with its two tiers, can not be eliminated by the Union, by the Company or even by the two agreeing to eliminate it. It can be eliminated only with the consent of the surviving A-scale pilots. So long as one A-scale pilot is employed, he can veto any proposal of the Union and any agreement by the parties which is contrary to paragraph B.

14. This permanent division of the Union, giving one group with a shrinking minority, the power to veto union decisions made by the majority through a democratic process is an obvious denial of union democracy and is clearly contrary to the premises of Landrum-Griffin Act. In practical terms it splits the union into two antagonistic groups with adversarial interests. So long as one group holds a veto power, the need of that group to compromise is not felt and the Union can not develop the unity needed to act effectively and responsibly. The union's democratic decision-making and its ability to make an agreement is held hostage for 25 years to a shrinking minority in the union.

Even though the disparities may be narrowed, the identification of two classes of members with one class having a stated power to veto the decisions of the majority has a divisive effect in the Union. There remains the symbol of distinction and preference which creates a sense of division. The Union is not a union but a fragmented disunity.

15. This permanent division of the union, with the A-scale pilots holding a veto power, deprives the union of its authority to make a binding agreement as required by the practical needs of collective bargaining. The bargaining must become three-cornered with the A-scale pilots as a necessary party. This can obviously complicate the bargaining process, depriving the union of the ability to conclude an agreement satisfactory to the majority of its members.

16. The common experience of unions which have given a group within the union a veto power over collective agreements is that it destroys cohesion and unity of the union, making more difficult the arrival at collective agreements which are acceptable to most or a majority of the members. This has been true of the Auto Workers, the Printers Union, the Musicians Union and various construction unions. In my study of ratification of collective agreements, I found that when a union required a double majority, that is, separate majorities in each of two groups, the likelihood that a' contract negotiated by the officers would be rejected was greatly increased. Minority groups would use their ability to veto the contract in order to extract special benefits for themselves at the expense of the majority, and even force the majority to a strike to obtain those special benefits.

17. The process of negotiating an agreement involves not only bargaining between union and management representatives. It involves the union representative bargaining with different interest groups within the union, seeking out the combination of achievable benefits which will win the widest support among the members. The very purpose of having a single bargaining representative is to make this internal compromise process possible. When any group has a veto power, this internal negotiation and bargaining is frustrated because those with the veto do not need to compromise. As a result, the union representative may be required to seek a larger package of benefits from management than would otherwise be acceptable. This increases the likelihood of breakdown and economic conflict.

18. When one group has a veto power over certain matters which would otherwise be subject to bargaining, these subjects are in effect removed from the bargaining table. The bargaining process is ultimately a complex process of compromise and trading, in which each party seeks a favorable, or at least acceptable, combination. When some items are removed from the table, it reduces the ability of the parties to put together an acceptable combination. If pension or welfare benefits are not on the table, combinations and compromises are to that degree limited and the negotiation process may fail to find an acceptable solution.

19. The experience of most employers parallels the experience of unions. Two-tier arrangements may serve an immediate need, but their continuation is productive of tensions in the workforce, a resentment of unequal

treatment, and a lack of cohesion and cooperation necessary for the most efficient and safe operation. Most employers sooner or later come to realize that maintaining artificial classes among employees and not treating employees doing the same work equally undermines morale and reduces productivity. For this reason, most two-tier arrangements are eliminated after two to five years. No agreements, to my knowledge, write such an arrangement in stone, as here, so it can not be eliminated by agreement for 25 years.

20. I find nothing in the documents which credibly shows that this two-tier arrangement serves any useful purpose for the Company. The only reason given by the Company for insisting on its retention is that the union wants it eliminated. Some of the A-scale pilots may, of course want it continued because it gives them a veto power over the majority, the very reason that it is destructive of the collective bargaining process.

## IV CONCLUSION

For the reasons stated above, it is my firm opinion that Supplement B should be eliminated, for it has outlived its usefulness. Its continuation violates the principle of democratic unionism articulated in Landrum-Griffin; it contradicts the principle and purpose of exclusive representation adopted by the Railway Labor Act; it frustrates the process of collective bargaining and the ability of the parties through negotiations to reach a peaceful solution acceptable to the parties, and solutions which are mutually acceptable. It is contrary to the letter, the spirit and

the purpose of our statutory system of collective bargaining. It serves only to impede and frustrate the process of negotiation, making the reaching of satisfactory agreements more difficult.

Respectfully submitted,

/s/ Clyde W. Summers
Clyde W. Summers

Subscribed and sworn before me this fifteenth day of February, 1991 in the County of Philadelphia, State of Pennsylvania.

/s/ Gloria D. Watts
Notary Public

NOTARY SEAL
GLORIA D. WATTS, Notary Public
City of Philadelphia, Phila, County
My Commission Expires Oct. 24, 1994

Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

No. 93-125

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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PAUL F. RENNEISEN, ET AL., PETITIONERS

*v.*

AMERICAN AIRLINES, INC.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

---

## BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION

---

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## QUESTION PRESENTED

Whether, as part of a 1983 collective bargaining agreement with its pilots' union, American Airlines violated Section 2 of the Railway Labor Act by agreeing to job security and minimum pay guarantees for all pilots then employed by American as a *quid pro quo* for substantial mid-contract wage and benefit concessions by the pilot group?

## STATEMENT UNDER RULE 29.1

Respondent American Airlines, Inc., is a wholly-owned subsidiary of AMR Corporation, a publicly traded Delaware corporation headquartered in Texas. American Airlines has no non-wholly-owned subsidiaries.

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# In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-125

PAUL F. RENNEISEN, ET AL., PETITIONERS

*v.*

AMERICAN AIRLINES, INC.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION

Respondent American Airlines, Inc., respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 990 F.2d 918. The opinion of the district court (Pet. App. 18a-34a) is not reported but is available at 1991 U.S. Dist LEXIS 18415. The report and recommendation of the magistrate judge (Pet. App. 36a-48a) is not reported.

### STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 24, 1993. A petition for rehearing was denied

on April 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The relevant portions of Section 2 of the Railway Labor Act, 45 U.S.C. § 152, are reproduced in the petition at pp. 2-3.

## STATEMENT OF THE CASE

Petitioners' discussion of the facts of this case consists of two paragraphs and an excerpt of Supplement B, the contract provision at issue. (Pet. 3-5). That brevity is no accident. Because the facts do much to undermine their legal theory, petitioners' statement fails to disclose much of the relevant factual background, which was uncontested and adopted by the courts below. To place the present petition in the proper context, American supplements petitioners' statement as follows:

### A. Facts

#### 1. *American and the Industry in 1983*

In 1983, American Airlines ("American" or "the Carrier") was at a financial and operational crossroads. Deregulation of the airline industry in 1978 had resulted in the appearance of a number of new, low-cost carriers. This new competition substantially affected American's operations. From 1979 to 1983, American's aircraft fleet shrank by more than 10%. American hired no new pilots during that period; indeed, by October 1983, just before the agreement at issue in this case was signed, approximately 457 pilots (more than 10% of the pilot group) were on furlough. Simultaneously, the Carrier faced increasing fuel costs—a serious problem for American because of its aging fleet of fuel-inefficient aircraft.

American's future looked equally bleak. In 1983, it operated 238 aircraft. American's forecasts projected that,

by 1988, its fleet would consist of 250 aircraft, reflecting an annual growth rate of only one percent per year. The prospects for recalling furloughed pilots and hiring additional pilots were similarly limited.

### 2. *American's Response to Stagnation*

Facing stagnant growth and the further loss of market share to the new low-cost carriers, American concluded that it could compete and grow only if it achieved a significant reduction in average unit labor costs. The costs of fuel and aircraft were essentially uncontrollable, and basically the same for American as for the low-cost carriers. Consequently, the primary cost differential between American and the low-cost carriers was in labor costs. American's labor costs at the time were approximately 35% of its total costs. Labor costs for the non-union start-ups (and for Continental Airlines after it declared bankruptcy in September 1983, and slashed its wage rates) ranged between 20% and 25% of total costs.

In 1981 and 1982, responding to these conditions, many of the other established U.S. air carriers negotiated temporary wage reduction agreements with their unions. American, however, did not believe that its unions would agree to wage reductions, nor did it believe that temporary reductions would solve the problem of generating and sustaining long-term growth.

Accordingly, American developed a proposal that involved no wage or benefit reductions for current employees. Instead, the proposal coupled pay and job security guarantees for incumbents with "market" rates of pay for new hires, *i.e.*, rates at or near those paid by the low-cost carriers. This plan was consistent with American's company-wide program of hiring at market rates, which the Carrier was implementing with its non-union employees and was negotiating with its other unions. The plan was designed to permit American to compete and expand with marginal labor costs at or near market rates,

and to reduce average unit labor costs sufficiently to permit long-term capital investment and ensure continued growth.

American first made its "two-tier" proposal during contract negotiations with the Transport Workers Union, the bargaining representative for American's mechanics and fleet service personnel. Agreement was reached in February 1983. In November 1983, American reached a similar "two-tier" agreement with the Association of Professional Flight Attendants.

### 3. *Mid-Term Negotiations With APA*

American and the Allied Pilots Association ("APA") were, at the time, parties to a collective bargaining agreement not due for renegotiation until 1984. Nevertheless, in March 1983, American asked the APA to enter into mid-contract negotiations to give American relief in average cockpit labor costs. American told the APA that the only alternative to such mid-term relief would be later wage cuts or a reduction in fleet size.

During the negotiations that eventually ensued, the APA ultimately agreed that growth would require a reduction in average unit labor costs, and that growth would inure to the benefit of all pilots, including pilots subsequently hired. Indeed, it was anticipated that these to-be-hired pilots would be the principal beneficiaries of the expansion plan; they would obtain jobs and rapid promotional opportunities that would not have existed otherwise. More fundamentally, the parties believed that growth would solidify American's ability to survive and prosper. This would promote job stability for all American employees in an industry that was facing an extended period of turmoil and instability.

Given the choice of wage cuts or a two-tier pay structure, APA negotiators preferred the two-tier option because it protected the jobs and pay levels of the employees who had directly participated in establishing

American as a major market force, while providing additional employment opportunities to new pilots at wage levels competitive with or more generous than those offered by the new market entrants.

The APA negotiators recognized, however, that American's growth would eventually make the incumbent pilots a minority in the APA.[1] The non-incumbent majority might then be willing to trade away the incumbents' job guarantees in return for improvements in their own pay and benefits. Accordingly, the APA negotiators insisted on iron-clad language to ensure that the APA and American could not modify or eviscerate the promises American had made to the incumbents unless the modifications were ratified by a majority of the incumbent group.[2]

#### 4. *Supplement B and the Quid Pro Quo*

After intensive negotiations, American and the APA reached agreement on November 4, 1983. The Agreement provided that American's incumbent pilots would forego a seven percent wage increase scheduled for November 1983, and accept a reduction in the rate of vacation accruals. The Agreement also established a two-tier wage structure under which pilots hired thereafter would be paid at proportionately lower (so-called "B-scale") rates and pension benefits throughout their careers with American.

In exchange for these concessions, American committed to an extraordinary expansion of its aircraft fleet. Specifically, American agreed to acquire over 200 additional aircraft within five years, nearly doubling its fleet.

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[1] As of January 1, 1991, 5,254 of American's 8,877 pilots, 59% of the total, had been hired since 1983.

[2] The proposal was APA's. Petitioners' intimation that *American* sought this special ratification procedure in order to create "discord" within the pilot group is wrong and finds no support in the record.

American also agreed to recall all furloughed pilots. Finally, American agreed to a series of protections for the incumbent (or "A-scale") pilots. These were embodied in Supplement B of the collective bargaining agreement.

Supplement B guaranteed lifetime job security for the incumbent pilots, and further guaranteed that their pay and retirement benefits would never fall below the then-current (1983) levels. Supplement B specified that American and the union would not alter those guarantees unless a majority of the then-active A-scale pilots agreed to the change. The Agreement permitted American and APA to reduce the pay and benefit differentials between the B-scale and the A-scale pilots, even down to a single penny, but not to "totally eliminate" them. Nothing in Supplement B prevented the APA from seeking similar—even identical—job and benefit protections on behalf of the B-scale pilots in subsequent bargaining.

### 5. *Subsequent Reduction and Elimination of B-Scale Differentials*

During negotiations in 1985, 1986, 1987 and 1991, the APA and American successively reduced and ultimately eliminated the A-scale and B-scale differentials. The separate A- and B-scales were merged into a single, seniority-based wage scale applicable to all pilots, regardless of date of hire. This is the same kind of scale traditionally used at American and in the industry generally.[3] Similarly, the APA and American have eliminated all existing distinctions between pre- and post-1983 pilots in benefits. The only remaining effect of the 1983 Agreement is that the pay differentials separating the first few steps on the current wage scale are greater than on the pre-1983 scale.

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[3] Thus, while the colloquial terms "A-scale" and "B-scale" are still sometimes used to denote pilots hired before the November 1983 agreement ("pre-1983" pilots) and thereafter ("post-1983" pilots), respectively, those terms are no longer literally accurate; there is now only one wage scale.

### 6. *Aftermath of Supplement B*

The benefits of the November 4, 1983 Agreement to American, to the APA, *and most particularly to the post-1983 pilots*, have been remarkable. After concluding that agreement, American embarked upon an expansion plan that has made it the nation's largest airline. In five years, American more than doubled its fleet and pilot work force. It is evident that many, if not all, of American's post-1983 pilots owe their current employment to the growth in American's operations that resulted from the November 4, 1983 Agreement. As the district court stated: "Indeed, it is not far-fetched to state that without [that agreement] there would be no post-1983 pilots, let alone an American Airlines." Pet. App. 33a.

## B. Decisions Below

Against this background, a disgruntled group of American's post-1983 pilots brought this action in the United States District Court for the Northern District of Illinois. Seeking certification as representatives of a purported class composed of all post-1983 pilots, they alleged that Supplement B constituted an illegal waiver of their right to bargain; that it destroyed the union's community of interest to such an extent that American could dominate or control the APA; that American had refused to bargain in good faith by insisting on retaining Supplement B; that Supplement B was an illegal restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; and that Supplement B discriminated between pre- and post-1983 pilots in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. (Pet. App. 22a-23a).

After petitioners abandoned their ERISA claim, the district court dismissed the Railway Labor Act ("RLA") claims for lack of subject matter jurisdiction, holding that Supplement B did not constitute the type of "fundamental blow" to collective bargaining necessary to support a

claim under Section 2 of the RLA. Because petitioners conceded that there could be no antitrust violation if Supplement B was legal under the RLA, the court also dismissed the antitrust claim. (Pet. 33a-34a).

The court of appeals affirmed the dismissal, but not for lack of jurisdiction. The court held that the Complaint failed to state a claim under Fed. R. Civ. P. 12(b)(6), based both on the district court's substantive analysis and the fact that Section 2 of the RLA does not give minority groups in a union a cause of action against their employer for adhering to agreements that the union decides not to challenge. (Pet. App. 2a-3a, 11a-17a). The court stated:

> We see nothing sinister and nothing contrary to the RLA or federal labor policy in an agreement that permanently gives benefits to a shrinking percentage of a union's membership. Plaintiff's efforts to compare locked-in benefits to a permanent waiver of the right to bargain in the first instance borders on outrageous. Many union agreements allocate superior benefits to certain groups of workers. The added wrinkle in plaintiff's case is temporal: the guarantees are permanent. From the perspective of the union in 1983, however, permanent guarantees for the 1983 pilots were far preferable to negotiable guarantees. Plaintiffs now seek to blame American for their union's success ten years ago.

(Pet. App. 15a).

## ARGUMENT

Having reaped the rewards of the job expansion secured by Supplement B, petitioners now attack the agreement because it precludes the APA from trading away the job security and compensation guarantees of the pre-1983 pilots in exchange for higher wages for petitioners without the consent of the majority of the pre-1983 pilots. The lower courts properly rejected that challenge, and further review in this case is not warranted. The decisions below were grounded in settled principles of federal labor law, and the conclusions reached by the magistrate judge, the district court and the unanimous panel of the court of appeals evince a common-sense and unexceptional application of these principles.

The petition presents no special or important reason for further review. Contrary to petitioners' claims, this case presents no conflict with any other court of appeals decision. Petitioners attempt to manufacture such a conflict based on three cases. In fact, each of those cases *supports* the decision of the court of appeals in this case. Two of them support the proposition that Supplement B was a "permissive" subject of bargaining and, upon agreement, became a lawful, enforceable contract. The third case rejected a challenge to a collective bargaining agreement providing *permanent* job guarantees and other benefits.

Nor does the decision below reflect a departure from this Court's precedents or from general principles of federal labor law. To the contrary, the decision is fully consistent both with the teachings of this Court and a long line of lower court cases:

(1) Petitioners repeatedly assert that Supplement B's ratification procedure strips the APA of its status as the exclusive bargaining representative of American's pilots and provides for unlawful "tripartite" bargaining. Decisions by this Court and the lower courts, however, have

consistently affirmed that special ratification rights for sub-groups of employees are permissible subjects of bargaining and agreement between unions and employers.

(2) Petitioners insist that Supplement B is unlawful because it inevitably will create dissension within the bargaining unit. This Court has expressly rejected the same "divide and conquer" theory in a recent case against another airline, *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

Finally, review by this Court is unwarranted because the parade of horribles envisioned by petitioners is built not upon a live controversy, but upon a series of speculations and hypotheticals. Supplement B, we are told, is unlawful because (i) either American or APA may, at some point in the future, propose reductions in pay or retirement benefits for pre-1983 pilots; (ii) the proposed reductions may reduce these pay or retirement benefits *below 1983 levels*, thus requiring the modification or elimination of Supplement B's guarantees; (iii) the non-proposing party might agree; and (iv) the majority of pre-1983 pilots might not vote to ratify the contract embodying the modifications. Petitioners cannot point to even a remotely similar occurrence in the ten years since Supplement B was signed, or to the likelihood of any such scenario occurring in the future. This Court's scarce resources are best spent resolving live—not hypothetical —controversies.

## I. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS.

Petitioners assert that three cases conflict with the decision below: *Reichhold Chem., Inc. v. NLRB*, 953 F.2d 594 (11th Cir. 1992); *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1053 (1991); and *Seaboard World Airlines v. Transport Workers Union*, 425 F.2d 1086 (2d Cir. 1970). In fact, all three cases directly support the decision below.

In *Reichhold*, the employer insisted in bargaining with its union that it be permitted to negotiate directly with its employees over certain job security agreements. In *Toledo Typographical*, the employer insisted that the union bargain over the scope of the underlying collective bargaining unit. In each case, the court held that the employer committed an unfair labor practice by conditioning agreement on, or "bargaining to impasse over," a lawful but non-mandatory subject of bargaining. Petitioners cite these cases as "strongly suggesting" that agreements permitting employers to bypass a union and deal directly with employees are unlawful where they would have a divisive impact on the cohesiveness of the bargaining unit, rendering concerted action more difficult. Pet. 16-18. In fact, they stand for the contrary proposition: such clauses are lawful if the union agrees to them.

To begin with, the cases are inapposite because nothing in Supplement B permits or even contemplates that American could bypass the APA and deal directly with the pre-1983 pilots. Even if it did, however, as made amply clear in *Reichhold* and *Toledo Typographical*, the clause would be lawful because APA agreed to it. Those cases merely illustrate the distinction between so-called "permissive" and "mandatory" subjects of bargaining. Under the National Labor Relations Act ("NLRA"), employers and unions are statutorily obligated to bargain over "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d).[4] Bargaining parties may bargain to impasse on such subjects. With respect to non-mandatory or permissive matters, however, either party is free to bargain or not to bargain, and to agree or not to agree. *Reichhold Chem.*, 953 F.2d at 595, *citing NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) ("Borg-Warner"). Consistent with these

[4] The analogous provision under the Railway Labor Act addresses "rates of pay, rules, or working conditions." 45 U.S.C. §§ 151a, 152 First, 156.

principles, in both *Reichhold* and *Toledo Typographical* the employers were held to have committed an unfair labor practice, *not* because their bargaining proposals were unlawful, but because the proposals concerned "permissive" subjects of bargaining and the employers impermissibly bargained to impasse over them.

By contrast, APA *did* negotiate, and an agreement *was* reached. No case cited by petitioners—and none known to respondent—would require, or even permit, the federal courts to reassess the wisdom of this consensual bargain.[5] Petitioners admit as much by insisting that "it is simply not the prerogative of the federal judiciary to determine for the bargaining representative the relative worth of its bargaining positions or the effectiveness of its negotiating strategy." Pet. 10 n.5. American wholeheartedly agrees, and this answers the petition rather succinctly.

Nor is *Seaboard World Airlines v. TWU*, 425 F.2d 1086 (2d Cir. 1970), in conflict with the decision below. *Seaboard* involved a "supplemental security agreement" between the airline and its navigators. It provided job guarantees and fixed the terms and conditions of employment *permanently*.[6] In its two opinions, at 425 F.2d 1086 (2d Cir. 1970) and 443 F.2d 437 (2d Cir. 1971), the Second Circuit held that the permanent arrangement was lawful and enforceable under the RLA. Petitioners'

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[5] There are limited circumstances, of course, when judicial scrutiny of the substance of collective bargaining is warranted, for example, when the union breaches its duty to represent fairly all of the members of the unit. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65 (1991). As the court of appeals aptly noted, however, even assuming the facts supported such a claim, this is not a duty of fair representation case, and the union has never been a party to this lawsuit.

[6] All terms of employment were permanently fixed except for wages, which could be renegotiated once after a period of 10 years. 425 F.2d at 1087-88.

suggestion, Pet. 18, that the court enforced the arrangement only because it "could be altered by the written consent of the parties," is false; the subject was not mentioned as a basis for either of the court's opinions. Indeed, in its second opinion (which petitioners fail even to cite), the court expressly rejected the union's challenge to the permanency of the arrangement as "requiring little comment." 443 F.2d at 439.[7]

## II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH BASIC PRINCIPLES OF LABOR LAW.

### A. American and the APA Lawfully Agreed to a Ratification Procedure Carefully Tailored to the Exigencies Facing the Parties.

The petition's central theme is the claim that Supplement B creates a "tripartite" bargaining structure that strips the APA of its status as the exclusive bargaining representative of all of American's pilots. Pet. at 8, 16. That proposition has no record support and is wrong as a matter of historical fact: American does not negotiate and has never negotiated with any pre-1983 pilot or group of pilots. The Carrier has bargained *exclusively* with the APA on *all* matters related to the rates of pay, rules, and working conditions of *all* of its pilots.

Moreover, as noted by the courts below, Supplement B does nothing to restrict in any meaningful way the APA's freedom to bargain on behalf of the entire pilot group or any subgroup. APA is even free to propose job and

[7] Decisions under the NLRA similarly uphold the validity of collective bargaining agreements of extended or permanent duration. *See United Mine Workers of Am. 1974 Pension Trust v. The Pittston Co.*, 984 F.2d 469 (D.C. Cir), *cert. denied*, 113 S. Ct. 3039 (1993); *Armistead v. Vermitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984).

benefit guarantees for post-1983 pilots *identical* to those achieved by the union in 1983 for all pilots then on the seniority list. Pet. App. 14a, 29a-30a, 42a-43a.[8] Supplement B simply does not provide for "tripartite bargaining" and there is no basis for petitioners' insistence that it does. Although the pre-1983 pilots are given a special voice in the ratification process in the event of contemplated changes to the Supplement's guarantees—guarantees for which those pilots paid by forfeiting wages and benefits due them in 1983—there is *no* evidence to support petitioner's contention that actual *bargaining* with the pre-1983 pilots, or any sub-group of them, is required or even permitted by the contract's terms.[9]

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[8] Petitioners assert that "all concessionary bargaining must occur solely at the expense of the [post-1983] pilots, or with the express agreement of a majority of the [pre-1983] pilots." Pet. 9. That assertion is wrong: Supplement B guarantees the pay and pension benefits of the pre-1983 pilots at *1983* levels. Nothing in Supplement B precludes concessionary bargaining over the entire spectrum of other topics, even below 1983 levels, or over wages and pension benefits down as far as 1983 levels.

[9] For this reason, the petitioners' reliance on cases such as *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975); *J.I. Case v. NLRB*, 321 U.S. 332 (1944); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944); and *Medo Corp. v. NLRB*, 321 U.S. 678 (1944), is misdirected. In those cases, the employer (or the employees) circumvented a certified bargaining representative to negotiate deals directly between employer and employee. The cases involved actual negotiations—collective bargaining—and *not* procedures for contract ratification. Here, there have not been any such negotiations, nor will there be under Supplement B.

Petitioners similarly mis-cite two National Labor Relations Board ("NLRB") decisions, *Westinghouse Air Brake Co.*, 123 N.L.R.B. 859 (1959) and *Wilford Auto Sales, Inc.*, 106 N.L.R.B. 1396 (1953). Those cases stand for the unchallenged but inapposite proposition that a union and employer may not bargain away an NLRB certification by agreeing that the union need not represent employees the Board has certified it to represent. The cases are meaningless in the present context because, as explained above, APA has represented, is representing, and will continue in the future to represent

It is not surprising that petitioners attempt to blur the distinction between so-called "tripartite" bargaining and collectively bargained *ratification* procedures. This Court spoke with some degree of specificity on the latter topic in *Borg-Warner*, 356 U.S. at 350 (1958), and petitioners' argument cannot be reconciled with the holding of that case. In *Borg-Warner* the employer bargained to impasse on a "ballot clause" that would have required a ratification vote on the employer's final contract offer *prior* to any strike by the union. More importantly, the employer insisted that *all* of its employees, union and non-union alike, be permitted to vote in the ratification process. In essence, the employer insisted that employees *outside* of the collective bargaining unit be allowed to determine the terms and conditions of employment for those *inside* the unit. As such, the Court recognized that the ratification provision could "substantially modif[y] the collective bargaining system . . . by weakening the independence of the 'representative' chosen by the [unionized] employees . . . ." The Court concluded, however, that the proposal was a *permissible* topic of bargaining, not an unlawful one. Consequently, the employer was entitled to make the proposal and, if an agreement had been reached, the resulting contract would have been fully enforceable. *Id.* at 349.

Under this standard, Supplement B is plainly lawful. The ballot clause at issue in *Borg-Warner* would have given the power of ratification to employees outside of the collective bargaining unit—to employees with only an attenuated interest in the terms of the agreement. Supplement B does precisely the reverse, giving a special voice to employees uniquely affected by the terms submitted for ratification. If, as this Court held, the former provision is a lawful basis for reaching a collective agreement, unquestionably the latter is as well.

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*all* of American's pilots, unless the pilot group chooses otherwise. The parties have never "bargained away" any representation duty.

Given the clarity of this Court's guidance in *Borg-Warner*, it is not surprising that petitioners have been unable to cite a single case or NLRB opinion condemning a consensual agreement on voting or ratification procedures reached in arms-length bargaining between management and labor. Rather, the decisions of the courts of appeals [10] and the NLRB [11] uniformly classify such provisions as permissible, lawful topics of bargaining.

### B. Supplement B Does Not Violate Section 2 Fourth of the Railway Labor Act Because It Does Not Constitute a "Fundamental Blow" To Collective Bargaining.

Petitioners insist that Supplement B violates Section 2 Fourth of the RLA because it results in a "lack of cohesion" within the unit. Pet. 15. This, they claim, strikes a "fundamental blow . . . to the collective bargaining process itself" and so violates Section 2 Fourth, referring to the standard established by this Court in *Trans World Airlines*, 489 U.S. at 442. Here too, however, petitioners have failed to cite a single case condemning an arms-length, collectively bargained agreement for this reason.[12]

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[10] *See, e.g., Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1987) (proposal on voting procedures is permissive, not illegal topic); *Allis-Chalmers Mfg. Co. v. NLRB*, 213 F.2d 374 (7th Cir. 1954) (same); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956) (same).

[11] *Hertz Corp.*, 304 N.L.R.B. 469 (1991); *Williamhouse-Regency of Delaware, Inc.*, 297 N.L.R.B. 199 (1989), *enf'd*, 915 F.2d 631 (11th Cir. 1990); *Zayre Dept. Stores*, 289 N.L.R.B. 1183 (1988); *Freedom WLNE-TV, Inc.*, 278 N.L.R.B. 1293 (1986); *Grace & Hornbrook Mfg. Co.*, 225 N.L.R.B. 15 (1976).

[12] Petitioners attach an Affidavit by Professor Clyde Summers, who argues that arrangements like Supplement B, "mak[e it] more difficult [to arrive at] collective agreements which are acceptable to most or a majority of the members." Pet. App. 67a. Supplement B, Summers concludes, has been counterproductive for the APA, just as similar agreements have been counterproductive for "the Auto Workers, the Printers Union, the Musicians

In fact, this Court dismissed a similar "divide and conquer" theory in *Trans World Airlines, supra.* In that case the carrier had unilaterally given preferential treatment at the close of a strike to so-called "cross-over" strikers, *i.e.*, strikers who decided to stop striking and return to work before the strike had ended. The union argued that such favorable treatment would "cleave" the employee group into identifiable classes, with consequences for union cohesiveness that would linger "long after the strike [had] ended" and inevitably hamper the union in future concerted activities. "Resentful rifts among employees," the union argued, "will . . . persist . . . because TWA's [policy] 'set up a competition *among* [the union's members] and thereby undermined the group's ability to take the collective action that it is the very purpose of the [RLA] to protect.'" 489 U.S. at 436 (citation omitted; emphasis in original).

In rejecting the union's claim, this Court began by noting that the 1934 amendments to the RLA (of which Section 2 Fourth was a part) were aimed principally at the *pre-certification* conduct of employers, *i.e.*, at employer efforts to chill union organizing activities. *Id.* at 440-41. Section 2 Fourth therefore has only limited post-certification applicability: only employer conduct that constitutes a fundamental blow to union activity or a direct attack on the collective bargaining process itself could constitute a violation of the provision. *Id.* at 442. Addressing the union's "divide and conquer" theory directly, the Court held that TWA's actions in fostering the alleged schism within the craft failed to constitute *either* a fundamental blow to union activity *or* a direct attack on the collective bargaining process.

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Union and various construction unions." *Id.* Summers' Affidavit proves only that Supplement B is not, as petitioners suggest, unprecedented. Although Summers apparently believes those similar arrangements are undesirable, he does not suggest that they are unlawful. Similarly, he nowhere opines that *Supplement B* is unlawful, merely that it has "outlived its usefulness." *Id.* at 69a.

In this case, petitioners do not attack *unilateral* employer conduct, but a collectively bargained response to difficult financial circumstances. If petitioners are to be believed, that response could have an impact at American similar to the impact of the cross-over policy at TWA. Petitioners have not suggested, however, why the product of intense, arms-length collective bargaining by American and the APA should receive *less* deference from this Court in this case than TWA's unilateral actions in *Trans World Airlines*. *See Humphrey v. Moore*, 375 U.S. 335, 349 (1963) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."), *quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

Federal labor policy encourages labor and management to resolve at the bargaining table the challenges that confront them, and accords them wide latitude so that they can accomplish that goal without the constant fear of judicial second-guessing. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In particular, bargaining parties are not prohibited by the RLA "from making contracts which may have unfavorable effects on some members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203 (1944).[13]

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[13] Petitioners argue that American's vigorous defense of Supplement B can only be explained by a desire to impose a divisive bargaining structure on the APA. Pet. 10 n.5. This argument ignores the fact that the Complaint in this action sought hundreds of millions of dollars in back wages and antitrust damages. American's decision to defend against that claim cannot reasonably be ascribed to a sinister bargaining agenda.

## III. PETITIONERS' THEORY WOULD ELIMINATE JOB SECURITY GUARANTEES AS A SUBJECT OF COLLECTIVE BARGAINING.

Throughout their petition and in their pleadings below, petitioners have professed a desire to protect the integrity of the collective bargaining process by attacking the "permanent" removal of certain topics from the bargaining table. However dressed, their protestations cannot disguise the fact that the only subject removed from the table for any period of time in this case was the ability of the post-1983 pilots to enrich themselves by trading away the job security and compensation guarantees of the pre-1983 pilots.

Ironically, it is petitioners who ultimately seek to limit the scope of permissible bargaining. The inescapable fact is that the *only* way to guarantee job or pay protections is to remove the subject from the bargaining table. Otherwise, the "guarantee" would be an illusion—it could always be bargained away later. Petitioners' theory, if upheld in this case, would preclude an employer from ever guaranteeing job or pay protections under the RLA (and presumably the NLRA). That outcome would change the landscape of collective bargaining in this country and significantly impair the ability of employers and unions to respond to and resolve difficult situations such as those presented in this case.

This case is instructive on all counts. The pre-1983 group sacrificed wages and benefits due them in order to obtain job and pay security. The only way to provide for such security was to guarantee it. The APA knew, however, that eventually pilots like petitioners would come along and try to cash in the promises made in Supplement B in exchange for more money for themselves. Without a ratification mechanism like that included in Supplement B, any job or pay "guarantee" American may have granted would have been illusory. To constitute a "guarantee," the agreement had to be, in some sense, guaranteed; this tautology seems to be lost on petitioners.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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